# IN THE INCOME TAX APPELLATE TRIBUNAL
# DELHI BENCH 'I-1', NEW DELHI

**Before Dr. B. R. R. Kumar, Accountant Member**

**Ms. Astha Chandra, Judicial Member**

**ITA No. 1091/Del/2018 : Asstt. Year : 2012-13**

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| ACIT,<br>Circle-4(2),<br>New Delhi-110002 | Vs | M/s Benetton India Pvt. Ltd.,<br>B-25, Infocity, Sector-43,<br>Gurgaon, Haryana-122002 |
| (APPELLANT) | | (RESPONDENT) |
| **PAN No. AAACD1013F** | | |

**Assessee by : Sh. Atul Jain, Adv.**
**Revenue by : Sh. M. K. Das, Sr. DR**

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|---|---|---|
| **Date of Hearing: 02.03.2022** | | **Date of Pronouncement: 07.03.2022** |

## ORDER

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the Revenue against the order of ld. CIT(A)-44, New Delhi dated 14.11.2017.

**Addition on account of ALP:**

2. The ld. CIT(A) deleted the adjustment made by the TPO in connection with international transaction on account of payments expatriates.

3. The TPO held that the case of the assessee failed on need, benefit and rendition test to justify any payment for reimbursements paid to the parent entity.

4. This issue stands adjudicated for the A.Y. 2007-08, A.Y. 2008-09, A.Y. 2009-10 and A.Y. 2010-11 wherein it was held that there was no meaningful analysis or evidence provided by

the TPO to hold that entire payment made by the assessee to expatriate should be reduced to zero.

5. For the sake of ready reference, the relevant portion of the order in ITA.No.31/Del/2017 for the A.Y. 2011-12 vide order dated 30.08.2019 is as under:

*"6. Challenging the said deletion of the addition, Revenue is in appeal before us. It is the argument of the Ld. DR that the Ld. CIT(A) committed error in deleting the adjustment on account of expatriate cost holding that there was no meaningful analysis/evidence produced by TPO to hold that the entire royalty payment should be reduced to zero and consequently deleting the addition of Rs.13,74,48,935/-made on this point.*

*7. Ld. AR submitted that while deleting the impugned addition, Ld. CIT(A) made factual verification of the observations made by the learned Assessing Officer and reached a factual finding that the assessee could not have conducted their business with the trademark of 'Benetton' without making the impugned payments and as a matter of fact the assessee had been using the technical know-how developed by the associated enterprise in its manufacturing activities on account of use of trademark and technical know-how. Further Ld. CIT(A) followed the decision of the Tribunal in assessee's own case for the Assessment Year 2006-07 which was followed by the Ld. CIT(A) for the Assessment Years 2007-08 to 2009-10. Ld.AR also produced copy of the order dated 27/10/2017 in assessee's own case for the Assessment Year 2009-10 in ITA No. 4229/Del/2014 wherein the identical issue was dealt with and answered in favour of the assessee.*

*8. We have gone through the record in the light of the submissions made on either side. Having considered the facts in their entirety, Ld. CIT(A) found that the entire sale of the 4 assessee has been due to the use of the brand name "Benetton" and the assessee has been using the technical know-how developed by the AE in its manufacturing activities on account of use of trademark and technical know-how. Ld. CIT(A) further found that in case of breach of royalty payment, the assessee will not be able to do the business with the trademark of 'Benetton' and therefore there was no point or justification in the Ld. TPO holding that the third party will not*

*make any payment for brandon technical know-how as provided by the AE to the assessee. Ld. CIT(A) further found that the assessee is getting designs and sketches, measurement specification, advertising and sales promotion materials, store MBS specification, package information as part of the royalty agreement and therefore, it is not a case where the assessee was not deriving any benefit by use of royalty payment on a net sale.*

*9. Apart from this, Ld. CIT(A) referred to the decision of the Tribunal on the same issue under identical set of circumstances for the Assessment Year 2006-07 where the benchmarking of the royalty was held at arm's length by not approving the TNMM analysis by bunching all the international transactions. He further noted that in assessee's case for the Assessment Years 2007-08 to 2009-10 also, similar approach was followed.*

*10. We have perused the copy of the order dated 27.10.2017 in ITA No.4229/Del/2014 in assessee's own case where the Revenue preferred the appeal challenging a similar deletion and found that following the consistent view taken in assessee's own case 5 by the Revenue as well as by the Tribunal, the Tribunal held that employment of the CUP method by the taxpayer in respect of the international transaction relating to the payment of royalty was proper and rule of consistency is required to be followed by the Revenue.*

*11. Since the facts are similar and issue is identical, we find no reason to take a different view for this assessment year. While respectfully following the consistent view taken by the Tribunal in assessee's own case for the Assessment Years 2006-07 to 2009- 10, we hold that the impugned addition cannot be sustained and there was no illegality or irregularity in the findings of the Ld. CIT(A). We, therefore, while upholding the findings of the Ld. CIT(A) find the appeal of Revenue as devoid of merits and accordingly dismissed the same."*

6. Since, the matter squarely covered by the order of the Tribunal, the vehement arguments of the ld. DR have been duly considered. However, in the absence of any material change in the factual matrix and legal proposition, we decline to interfere with the order of the ld. CIT(A).

**Security deposit written off:**

7. During the year, the assessee has entered into a letter of intent for obtaining shops on lease. As per this letter, the assessee was required to pay security deposits at the time of executing this letter of intent. As per the termination clause of the letter, in case the lease has been terminated by the lessee, the entire amount of security deposit shall be forfeited by the lessor.

8. The advances given are as under:

| Parties | Advances written off in AY 2012-13 (Rs.) |
|---|---|
| VastrapurLake, Ahmadabad | 3,06,900 |
| Empress City, Nagpur | 4,31,917 |
| PondaRoad, Goa for Ucb | 3,01,056 |
| Ponds Road, Goa For Sisley | 94,580 |
| Total | 11,34,452 |

9. Owing to certain business reason and as per the management decisions, the assessee has terminated these letters of intent and resultantly the amount of security deposits have been forfeited by the lessor. The assessee had written off these advances amounting to Rs.11,34,453/- in the books of accounts and claimed in P&L account. The AO disallowed such claim of advances written off on the grounds that the same forms part of the balance sheet and not in revenue in nature.

10. The assessee submitted that the advances written off is not a capital loss as it is written off as security deposits against the shops obtained on rent. Such write off of security deposits was incidental to the business of the assessee and was for running its operations. It was argued that when the security deposits was forfeited by the lessors, the same had become loss for the assessee, therefore, the same has been claimed as

a business expenditure in the books of accounts. He relied on a number of judgments holding that any expenditure incurred in connection with the acquisition of premises on lease should be held to be for the purpose of business of the assessee.

11. The ld. DR argued that this expense being capital in ature should not be allowed to be written off in the books of accounts and claimed in P&L account. He relied on the judgment of the Hon'ble Delhi High Court in the case of Triveni Engineering in ITA No.56 of 2009 vide order dated 14.09.2010 and the order of the Co-ordinate Bench of ITAT Delhi in the case of Raj Khosla in ITA No. 6581/Del/2016 vide order dated 06.07.2018.

12. We have gone through the said judgments which are as under:

**Raj Khosla(Supra):**

*"2. Briefly stated facts of the case are that the assessee file return of income on 27/09/2011, declaring loss of Rs.48,84,022/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. During scrutiny proceedings, in respect of sundry balances written off of Rs.26,93,019/-, the assessee explained that same relate to security deposit forfeited by the landlords at various premises which were taken on lease by the assessee. The Assessing Officer observed that the assessee submitted a list of 38 such premises alongwith name of the landlords, but no supporting documents to justify the claim made by the assessee, were filed by the assessee. According to the Assessing Officer, writing off of security deposit of 38 landlords in a single year was unexplainable and suspicious as normally the tenant is at*

*liberty to adjust the security deposit against last month rental before vacating the premises. The Ld. Assessing Officer also held that said written off was not allowable under section 36(1)(vii) of the Act as the said amount was not in the nature of trading liability and not declared as income in any of the previous years. In view of the observations, he disallowed the claim of the assessee and added the amount of Rs.26,93,019/- to the loss declared by the assessee. Aggrieved, the assessee filed appeal before the Ld. CIT(A). Before the Ld. CIT(A), the assessee filed copy of rent agreements entered into between the assessee and the landlords of premises as additional evidences for admission under Rule 46A of Income-tax Rules, 1962 (in short 'the Rules') along with other information and claimed that payments were made by the assessee to take the premises on rent to run its business and the assessee was required to pay the landlords the amount of security deposit with reference to agreed rent per month. According to the assessee, it was rent paid in advance in respect of the premises which was vacated, but could not be adjusted against the rent payable, since premises vacated due to the reasons beyond the control of the assessee and for the reason that those premises were not required any further and continue in those premises would further add unnecessary financial burden for maintaining those premises. According to the assessee, the balances written off were in the nature of a business loss allowable to the assessee. The Ld. CIT(A), however relying on the decision of the Hon'ble Delhi High Court dated 14/09/2010 in the case of CIT Vs Triveni Engineering industries limited in ITA No.56 of 2009, held the sundry balances written off for security deposits as in the nature of the capital and accordingly disallowed observing as under:*

*"5.6. I have carefully considered the assessment order, written submissions, Remand Report and the Rejoinder thereto. The additional evidence furnished are rent agreements regarding payment of security deposits and is admitted for adjudication of appeal. The Ld. AR has stated that the amount written off by the appellant represents security deposits or part thereof which could not be recovered from the landlords, in spite of every effort made to get the refund. He has stated that since the amount of security deposit given, was for business purpose writing off of the same should be treated as a business loss which is allowable as per provisions of Section 37(1) of the Act. He has relied on a number of case laws to support his contention. Facts in most of the case laws are distinguishable as the forfeiture of deposits in those cases arose out of non fulfillment of contract obligations or breach of commitment. In the case on hand, the appellant has not provided any evidence about the efforts made to recover the security deposit from the landlords. In appellate proceedings, the Ld. AR was requested to file details, evidence to substantiate its contention that efforts had been made to obtain the refunds. The Ld. AR expressed his inability to furnish any evidence to this effect. In any case, the amounts written off cannot be treated as a business loss, as the same is in the nature of capital loss. The Hon'ble High Court of Delhi in the case of CIT vs. Triveni Engineering Industries Ltd. in ITA No.56 of 2009 in dated 14.09.2010 held as under:*

*……..*

*15. Coming to the security deposit written off by the assessee, the moot question is as to whether the advances were given for securing the capital assets. It is not disputed by the Department that the payment of security deposit to landlords was for obtaining use of premises for the purposes of business against the payment of rent. The contention of the assessee, in this backdrop, is that this payment was clearly in the revenue field, viz., for facilitating carrying on of business more profitably and efficiently while leaving the fixed capital untouched. Learned counsel for the Revenue, however, argues that the security deposits were given for obtaining the premises on rent and thus, the ass essee had obtained a right to use the property, i.e., tenancy right, which is a capital asset.*

*16. In order to appreciate the controversy, we may first state the true nature of this deposit. When the premises were taken on rent by the company, the payments in the form of security deposits were given to the land lords. Since the Rent Agreement entered into with the said landlords has not been produced, which could have shown the purpose for which security deposits were made, in the absence thereof, we presume that normal practice which is followed in giving such security deposits existed here also. On that premise, it can be inferred that these were refundable security deposits, which were to be given back by the landlords to the company on the conclusion of tenancy period and surrendering of the leased premises by the company to the landlords. Therefore, these security deposits were not in the form of rent. The question*

*would be when such a security deposit has become non-recoverable for some reasons whether it can be allowable as deduction under Section 28 of the Act. The deposits were not given in the ordinary course of business either. These were given for securing the premises on rent; albeit for the purpose of carrying on business therein. Once we keep in mind this true nature of deposits, we find force in the submission of Ms. Bansat, learned counsel for the Revenue.*

*17. We may point out that the assessee had relied upon the judgment of the Supreme Court in the case of Commissioner of Income Tax Vs. Madras Auto Service (P) Ltd. [233 ITR 468], However, that judgment would not be applicable to the facts of the present case. The expenditure incurred on the construction of building on a leased property was treated as revenue expenditure by the Supreme Court, as the assessee was getting business advantage and was acquiring the business asset in the context of specific Clause in the lease deed. Therefore, the property was not treated as that of the lessor. Further, the Supreme Court found that by incurring the expenditure of this nature, the assessee had taken the advantage in the form of reduced rent for a much longer period. This judgment is, thus, not applicable in the present context.*

*5.7. Adverting to the facts in the present appeal, it is noted from the lease agreements that the appellant has paid the impugned amount(s) as refundable interest free security deposit. These deposits were given for obtaining the premises on rent and thus, the appellant had obtained a*

*right to use the property, i.e., tenancy right, which is a capital asset. In view thereof and in the light of judicial pronouncement reproduced above, writing off of the impugned security deposits claimed by the appellant as a business loss is not allowable as the same is in the capital field and not allowable as arevenue expenditure as per section 37(1) of the Act. The action of the AO in disallowing the claim of write off of security deposit of Rs.26,93,019/- is therefore, upheld and the addition is confirmed. These grounds of appeal are ruled against the appellant."*

*2.1 Aggrieved with the above finding of the Ld. CIT(A), the assessee in appeal before the Tribunal raising the grounds as reproduced above.*

*3. Before us, the Ld. counsel filed a paper book containing pages 1 to 394 and referred page 41 to 314, which are copy of various rent agreement in respect of the premises taken on lease. The Ld. counsel relied on the decision of the Tribunal, Delhi Benches in the case of Fab India Private Limited Vs. ACIT in ITA No. 119 /Del/2012 and 672/Del/2012 for assessment year 2008- 09, wherein the loss of security deposit has been held as business loss in the revenue field. The Ld. counsel also relied on the decision dated 20/05/2014 of the Tribunal of Hyderabad bench in the case of Social Media India Vs. ACIT in ITA No. 390/Hyd./2013 for assessment year 2009-10. The Ld. counsel also referred to the decision of the Hon'ble Supreme Court in the case of Empire Jute Industries, reported in 124 ITR 1 (SC).*

*4. The Ld. counsel further submitted before us that in case of the few premises, the landlords have adjusted the security deposits towards pending rent whereas in other cases the*

*landlords refused to refund the security deposits. Thus according to him, the security deposit adjusted against rent would be in the nature of business expenditure. However, he submitted that this factual information has not been verified by the lower authorities and therefore if required the issue may be sent back for verification.*

*5. The Ld. DR relied on the order of the Ld. CIT(A) and submitted that the Ld. CIT(A) has followed order of the jurisdictional High Court in the case of Triveni Engineering Industries Ltd. (supra) and, thus, say might be upheld, however, he did not object for verification of the claim of the Ld. counsel that part of the security deposits were already adjusted against the rent and allowable as revenue expenditure.*

*6. We have heard the rival submission and perused the relevant material on record. In the case of Fab India Overseas Pvt. Ltd (supra), the Tribunal in para 18 of the order observed as under:*

> *"18. On this factual matrix the issue before us is "whether the loss of security deposit in question is a business loss in the revenue field". In our considered opinion the above loss is a business loss; for the reason that the assessee has taken on lease many premised spread over many part of the country, and this act of taking this show room on lease is in the normal course of business. In fact 84 show rooms are taken on lease at various places. Six months rent was given as security deposit. This was given in the course of business. The transaction is intimately connected with the business of the assessee. The Assessing Officer has not disputed the genuineness of the claim. The CIT(A)*

*has disallowed the amount on the ground that the loss was in the capital field. We do not agree with this finding. There is no enduring benefit to the assessee. In our view the loss in question is in the revenue field and has been rightly claimed u/s 28. This is not a bad debt. It is not a case where "lease premium" is paid for a long term lease as in the case of Kribco (supra). It is a deposit in the usual course of taking show rooms on lease."*

*7. Similarly, the Tribunal in the case of Social Media India (supra) observed as under:*

*"11. We have considered the rival contentions and perused the orders of the CIT(A). Following the principles relied upon in earlier ground, Ld. CIT(A) in this case also held that advances are not revenue expenses and the liability to incur expenses has not accrued until the time liability arises the advance remains in capital field, written off of such amounts was not allowed as revenue loss. On considering the principles on the issue and the decision relied upon, we are of the view that the acquisition of premises on lease was not ordinarily be in the capital field as the monies are advanced for the purpose of running business. Thus, advances even if crystallized would not result in any capital asset. Since these advances are made in the course of assessee's business on which assessee did earn incomes, premature closure of lease agreements resulted in forfeiture of deposits. Since the rentals paid are on revenue account, the forfeiture of the deposits in the rentals also shall be on revenue account. Therefore, we are of the opinion that the write off of deposits is to be allowed as loss to assessee in the course of its business.*

*Therefore, A.O. is directed to allow the above amount. Accordingly, Ground No.3 of the assessee is allowed."*

*8. However, we note that the Ld. CIT(A) has followed the order of the jurisdictional High Court in the case of Triveni Engineering Industries Private Limited (supra). The relevant part of the order of the Hon'ble High Court has already been reproduced by us in part of the order of the Ld. CIT(A) extracted above. Thus, as far as principle of holding the security deposits as expenditure in the capital field is concerned, we do not find any error in the order of the Ld. CIT(A). ……."*

**Triveni Engineering (Supra):**

*"15. Coming to the security deposit written off by the assessee, the moot question is as to whether the advances were given for securing the capital assets. It is not disputed by the Department that the payment of security deposit to landlords was for obtaining use of premises for the purposes of business against the payment of rent. The contention of the assessee, in this backdrop, is that this payment was clearly in the revenue field, viz., for facilitating carrying on of business more profitably and efficiently while leaving the fixed capital untouched. Learned counsel for the Revenue, however, argues that the security deposits were given for obtaining the premises on rent and thus, the assessee had obtained a right to use the property, i.e., tenancy right, which is a capital asset.*

*16. In order to appreciate the controversy, we may first state the true nature of this deposit. When the premises were taken on rent by the company, the payments in the form of security deposits were given to the land lords. Since the Rent*

*Agreement entered into with the said landlords has not been produced, which could have shown the purpose for which security deposits were made, in the absence thereof, we presume that normal practice which is followed in giving such security deposits existed here also. On that premise, it can be inferred that these were refundable security deposits, which were to be given back by the landlords to the company on the conclusion of tenancy period and surrendering of the leased premises by the company to the landlords. Therefore, these security deposits were not in the form of rent. The question would be when such a security deposit has become non-recoverable for some reasons whether it can be allowable as deduction under Section 28 of the Act. The deposits were not given in the ordinary course of business either. These were given for securing the premises on rent; albeit for the purpose of carrying on business therein. Once we keep in mind this true nature of deposits, we find force in the submission of Ms. Bansal, learned counsel for the Revenue.*

*17. We may point out that the assessee had relied upon the judgment of the Supreme Court in the case of Commissioner of Income Tax Vs. Madras Auto Service (P) Ltd. [233 ITR 468]. However, that judgment would not be applicable to the facts of the present case. The expenditure incurred on the construction of building on a leased property was treated as revenue expenditure by the Supreme Court, as the assessee was getting business advantage and was acquiring the business asset in the context of specific Clause in the lease deed. Therefore, the property was not treated as that of the lessor. Further, the Supreme Court found that by incurring the expenditure of this nature, the assessee had taken the advantage in the form of*

*reduced rent for a much longer period. This judgment is, thus, not applicable in the present context.*

*18. In view of the above, this appeal is partly allowed, holding that the amount of Rs.15,34,951/- was not a revenue loss, and therefore not allowable as deduction."*

We have also gone through the judgment of Hon'ble Jurisdictional High Court in the case of Mohan Meakin Ltd. in ITA No. 405/2007 wherein it was held that "*the advances granted and subsequently written off in the books of accounts had been allowed as business deduction.*

*Hon'ble High court has analyzed the decision as under:*

*It is known practice that usually manufacturer gives advances to the workers which are adjusted or carried forward in the coming times against the works done by them. This was not an unusual practice which was liable to be outrightly rejected by the department. When the assessee had written off the dues recoverable from the Corporation and the same were accepted by the Department and it had also so written off, the advances made to M/s. Kanpur Boot House in its books of accounts, what else could be the proof with the assessee for its being unable to recover the same.*

*The other reason for No.807/M/ 807/M/12 /M/12 writing off was the demise of the proprietor, Bhagwan Das, M/s.Kanpur Boot House and the assessee in its wisdom did not choose to take the matter to the court apprehending counter claim and this decision of the assessee seems to be well reasoned. In any case, the Revenue could not compel the assessee to have recourse to litigation to recover the amount against dead*

*person or his legal heirs when in the given circumstances, the same may not be recoverable. The CIT(A) rightly recorded that the debt had become bad and not recoverable and it would be a futile exercise to take any action against the legal heirs of the deceased.*

*In view of the discussion as made by the Division Bench of J&K High Court and the Hon'ble Supreme Court, as quoted above, that the advances made by the assessee in the case were certainly of a type which would be within the contemplation of the words "laid out or expended wholly and exclusively for the purposes of the business". As no portion of the said advances could be stated to be loss of capital expenditure, but it being a plain case of business loss, it would certainly be allowable to be deducted under the provisions of Section 37 of the Act."*

13. We have also gone through the judgment of Hon'ble Supreme Court in the case of BadridasDaga vs. CIT (34 ITR 10) Calcutta Co. Ltd. vs. CIT (37 ITR 1) wherein it was held that "*the profit to be assessed are the real profits and they must be ascertained on ordinary principles of commercial training and commercial accounting. The profit should be computed after deducting losses and expenditure incurred for the purposes of business unless such losses or expenditure are expressly, or by necessary implication, disallowed by the Act."*

14. The Hon'ble Supreme Court in the case of CIT vs. Nainital Bank Ltd., 55 ITR 707 (SC) wherein it was held that "*under section 28, the trading loss of a business is deductible in computing the profits earned by a business. However, everu loss is not deductible unless it is incurred in carruing out the operation of the business and is incidental to the operation. Whether loss is incidental to the operation of a business or not,*

*is a question of fact to be decided on facts of each case, having regard to the nature of the operation carried on and the nature of risk involved in carrying them out. The degree of the risk or its frequency is not much relevant but its nexus to the nature of the business is material."*

15. Having gone through the entire judgments quoted by both the parties, provisions of the Act pertaining to interplay between Section 28 and Section 37 and facts of the case, we have no hesitation to hold that the assessee be allowed to claim the loss incurred in forfeiture of security deposits given for lease of rental premises as the expenses are incurred wholly and exclusively for the purpose of business.

16. In the result, the appeal of the Revenue is dismissed.
Order Pronounced in the Open Court on 07/03/2022.

Sd/-
**(Astha Chandra)**
**Judicial Member**

Sd/-
**(Dr. B. R. R. Kumar)**
**Accountant Member**

**Dated: 07/03/2022**
*Subodh Kumar, Sr. PS*
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**