Express Newspapers Pvt. Ltd. vs Commissioner Of Income Tax on 7 August, 1996

Equivalent citations: [1997]227ITR325(MAD)

JUDGMENT

Thanikkachalam, J.

1. In compliance with the order passed by this Court in TCP No. 8 of 1983, dt. 4th July, 1983, and in compliance with the order passed in TCP No. 210 of 1983, dt. 7th Nov., 1983, the Tribunal referred the following questions for the opinion of this Court under s. 256(2) of the IT Act, 1961, hereinafter referred to as the "Act" :

> T. C. No. 1824 of 1984 "1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the income from hire charges of printing machinery and motor vehicles derived by the assessee is assessable under the head "other sources" and not under the head "business"?
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> 2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the sums of Rs. 4,59,396 and Rs. 2,862 representing interest provided in respect of moneys borrowed by the assessee and written back in the accounts of the assessee are chargeable to tax as income under s. 41(1) of the IT Act, 1961?"
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> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income derived by the assessee for providing air-conditioning services is not assessable under the head 'business', but should be assessed as 'income from other source'?"

2. In so far as TC No. 1824 of 1984 is concerned, the facts leading to question No. 1 are as under :

> The assessee is a private limited company publishing newspapers. From the year 1969 it discontinued that activity, but yet got the newspapers published through some other agency. Its own printing machinery and motor vehicles were given on hire and the income that was received by way of hire charges was shown in the earlier years as income from "other sources" and the Department also accepted it. But for the year under consideration, i.e., 1976-77 assessment year, the assessee changed the head of income from "other sources" to "business". The ITO, on the basis of the past record, declined to accept the assessee's claim and his action was confirmed by the CIT(A). In the further appeal filed against that order before the Tribunal, it was contended that

since the principle of res judicata was not applicable to the income-tax matters, the past history and the past conduct of the assessee should not have been looked into and the assessee's claim should have been decided on merits. The Tribunal found that the contention put forward on behalf of the Revenue is acceptable. The records showed that ever since the publication was discontinued, the income from hire charges was disclosed as income from "other sources". Considering the provisions of s. 56(1)(iii) of the Act, the Tribunal held the income from such letting should be charged as income from other sources. The Tribunal thus held that the Revenue's claim is correct and sustainable and that the assessee's claim was not acceptable.

3. In as far as the second question in TC No. 1824 of 1984 is concerned, the relevant facts are as under :

In the course of the assessee's business as dealer in shares, the assessee borrowed moneys from various share-brokers. The interest provided in the accounts in respect of such borrowals was claimed as a deduction and was allowed as such in computing the income of the assessee in the earlier years. Subsequently at the time of settlement of accounts with share-brokers, the amount due to them on account of interest was settled at a figure lower than the figure provided in the accounts. As a consequence, the amounts thus given up were written back in the accounts as income which amounted to Rs. 4,59,396 and Rs. 2,862. These sums were brought to tax under s. 41(1) of the IT Act. The assessee did not accept this position and appealed to the CIT(A). The CIT(A) confirmed the order passed by the ITO on this aspect. Aggrieved, a second appeal was filed before the Tribunal. The contention put forward on behalf of the assessee was that for s. 41(1) to apply, the expenditure by way of interest incurred in the earlier years and allowed as deduction could be brought to tax only if it was recouped in cash or in any other manner whatsoever and that any other manner did not include settlement. The further contention was that the fiction enacted in s. 41(1) applied only to remission or cessation of a trading liability. The Tribunal found it extremely difficult to accept these contentions. According to the Tribunal, there are two basic requirements for the application of s. 41(1). One was there must be an allowance or deduction in the assessment for any year in respect of loss or expenditure or trading liability incurred by the assessee. The other was that subsequently during the previous year the assessee must have obtained whether in cash or in any other manner whatsoever any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation so that the remission or cessation so obtained on the value of the benefit accruing could be deemed as the income of the assessee. The Tribunal held that these two requirements were more than fully satisfied in this case. The amount of interest was allowed by the Department in the earlier years. When the settlement was reached between the assessee and the share-brokers, as a consequence of which the liability to pay interest get extinguished, the assessee got a benefit and that satisfied the second requirement. The Tribunal also drew support for its view from a decision of the Gujarat High Court in CIT v. Rashmi Trading (1976) 103 ITR 312 (Guj) to find that

the requirements of s. 41(1) were satisfied. Thus the Tribunal agreed with the Revenue and disallowed the claim of the assessee.

4. Insofar as TC No. 940 of 1985 is concerned, there is only one question referred by the Tribunal, which relates to whether the income derived by the assessee for providing air-conditioning services is assessable under the head "business" or under the head "income from other sources". The facts leading to the abovesaid question are as under :

In the asst. yr. 1976-77, the assessee had a property at Mathura Road, Delhi, a portion of which was allotted to its sister-concern, Indian Express Newspapers (Bombay) Pvt. Ltd., while the-other portions were let out to Hindustan Lever Ltd., Bharat Heavy Electricals Ltd., and Mineral and Metals Trading Corporation of India Pvt. Ltd. The assessee had an agreement with the tenants providing for rent but specifically for the charges payable for air-conditioning, the building being centrally air-conditioned. The assessee worked out the account receivable towards hire charges for air-conditioning and also allocated the consolidated rent received from the sister concern towards air-conditioning. The air-conditioning charges were separately reckoned and offered by the assessee as business income, whereas the balance was treated as rental income, assessable under the head 'property'. The ITO held that the air-conditioning charges could not be taken as business income and assessed such charges under the head 'other sources'. On the assessee's appeal, the CIT(A) held that the surplus receipt over the expenditure in respect of air-conditioning charges was assessable as business income. (Such a surplus being Rs. 12,10,303 as taken by him). On the Department's further appeal, the Tribunal restored the ITO's order. According to the Tribunal, the assessee is not holding the property primarily as a business asset. The Tribunal further pointed out that the relationship between the assessee and its tenants were that of the landlord and tenant and not as between a businessman and his customers. The Tribunal accepted the contention put forward by the Department that central heating/air-conditioning is an amenity in a modern building. Reliance was placed upon an earlier decision of this Court in CIT v. Lakshmi Co. (1982) 133 ITR 904 (Mad) and CIT v. Admiralty Flats Motel . The Tribunal has also pointed out that it was satisfied in the facts of the assessee's case the allocation, which is not in dispute, between rent and the air-conditioning charges in respect of the amounts received from the tenants justify the rental part to be assessed as income from property and the service charges as income from other sources. According to the Tribunal as long as it is found that there is severable contract as between rent service charges in respect of these tenants, it is open to him to take that stand. Thus, ultimately the Tribunal agreed with the view taken by the CIT in assessing the income derived by providing air-conditioning to the tenants as income from other sources.

5. In TC No. 1824 of 1984, question No. 1 relates to assessing the hire charges received by the assessee by hiring the printing machinery and motor vehicles. According to the assessee, such hiring charges should be assessed under the head "business". But according to the Department, such hiring charges should be assessed under the head "other sources". The assessee received hiring charges on

hiring the machinery and motor vehicles from M/s Indian Express (Madurai) on machinery installed at Madurai and from M/s Andhra Prabha Ltd., amounting to in all Rs. 2,21,500. The learned counsel appearing for the assessee submitted that the fact that in the earlier years the hiring charges for hiring the machinery and the motor vehicles was offered and assessed as income from other sources would not preclude the assessee to claim that such income should be assessed under the head "business" in the assessment year under consideration. According to the learned counsel appearing for the assessee though the assessee discontinued the printing and publishing works, but the assessee was continuing the publication works through its sister-concern. Since the printing was discontinued, the printing machinery and the motor vehicles were hired to the sister-concern and earned income by way of hiring the machinery and the motor vehicles. Therefore, inasmuch as the publishing activities continued, it cannot be said that the income earned by way of hiring the machinery and the motor vehicles would not came under the head "business income". In order to support this contention, the learned counsel appearing for the assessee relied upon two decisions CIT vs. Kongarar Spinning Pvt. Ltd. and B. Nagi Reddy vs. CIT (1993) 199 ITR 451 (Mad)

6. On the other hand, the learned senior standing counsel appearing for the Department submitted that the business of the assessee in publishing the newspapers as well as printing were discontinued from the year 1969 onwards. Therefore, the income derived by hiring the machinery and the motor vehicles cannot be considered as income from business. The learned senior standing counsel also pointed out that assessment in each year has got to be completed independently without depending upon the earlier years assessment, since the principle of res judicata is not applicable in tax cases. The learned senior standing counsel also pointed out that hiring the machinery and the motor vehicles is not the business of the assessee. Therefore, unless the assessee is doing the business and the assessee had income out of such business, that alone can be considered as business income. In the present case, inasmuch as the assessee discontinued its business of publishing the newspaper, it cannot claim the income earned by way of hiring the machinery and motor vehicles as income from business. The learned senior standing counsel further pointed out that the provisions of law applicable on facts arising in this case would be s. 56(2)(ii) and the provisions contained in s. 56(2)(iii) would not be applicable to the facts arising in this case, because machineries were not hired along with the building. In order to support his contention, the learned senior standing counsel relied upon the decision of the Supreme Court reported in New Savan Sugar & Gur Refining Co. Ltd. vs. CIT and another decision of this Court reported in CIT vs. Central Studios Pvt. Ltd. (1973) 88 ITR 298 (Mad)

7. We have heard both the learned counsel appearing for the assessee as well as the learned senior standing counsel appearing for the Department. The point for consideration is whether the income derived by the assessee in the assessment year under consideration by hiring the machinery and the motor vehicles can be assessed under the head "business income". Admittedly the assessee discontinued the business in publishing newspapers due to labour trouble, etc., and the printing works from the year 1969 onwards. The assessee gets its newspapers published through some other agency, which is a sister-concern. After the business was stopped, the printing machinery and motor vehicles were given on hire and consequently the income is received by way of hire charges. It is also the admitted case that the assessee is not doing business in hiring machinery and motor vehicles.

8. Sec. 56(2)(iii) of the Act states as under :

> "Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to income-tax under the head "Profits and gains of business or profession".

In the present case the buildings were not hired so as to say that the building is inseparable from the letting of the machinery. The printing machinery was hired separately. Therefore, on facts, the provisions contained in s. 56(2)(iii) of the Act would not be applicable. The proper provision that would be applicable according to the facts arising in this case is s. 56(2)(ii) of the Act, which states as under :

> "Income from machinery, plant or furniture belonging to the assessee and let on hire, if the income is not chargeable to income-tax under the head "profits and gains of business or profession".

In any event the assessee must show that it was doing the business and the income was earned during the course of doing such business. But in the present case, the assessee is not doing its business of publishing newspaper. It stopped such publication from the year 1969 onwards. But publication was being done through the sister-concern.

9. In CIT vs. Kongarar Spinners Pvt. Ltd. (supra) the question that arose for consideration was that whether the Tribunal was right in holding that the rent receipt from M/s Selvi Textiles (P) Ltd. on letting out to them a building to be used as a factory building should be assessed under the head 'business' and not under the head 'house property'. While answering this question, this Court held that in the instant case the assessee, which was already running a factory, had built another factory in its own compound and given it on rent to its subsidiary. The Tribunal found that the assessee was exploiting the asset indirectly through its subsidiary. Hence the income derived by the assessee had to be assessed under the head "income from property". The facts arising in the above said decision would go to show that the assessee was doing its business and during the course of its business another factory building was put up and that was exploited by letting it out. Therefore, this Court held that the income from the property let out should be assessed under the head 'business'. But in the present case the assessee stopped its business of publishing newspaper from 1969 onwards. The assessee was not doing business while hiring the machinery and the motor vehicles. Therefore, this decision would not render any assistance to the assessee to contend that the income derived by hiring the machinery and motor vehicles should be assessed under the head "business income".

10. In B. Nagi Reddy vs. CIT (supra), the question that arose for consideration was whether the Tribunal was right in holding that the income derived by the assessee from letting out the studios is assessable under the head "business". While answering this question, this Court held that there is no such thing as a naturally born commercial asset, as an asset becomes a commercial one in view of the use to which it is put in a business and not owing to its inherent qualities. Considering the

activities of the assessee in film business, as a producer, distributor, exhibitor, studio owner and the like, it was held that, on an overall consideration of the facts, the tax treatment to be accorded to the rental income had to be determined and the utilization of the studios by the assessee by making his own films and the letting out of the buildings to others as well as realising rental income, constituted the business activities of the assessee in relation to the studios, and, therefore, the rental income should be brought to tax under the head "business income". Therefore, here also the assessee was continuing its business and in the course of the business, the rental income was earned by letting out the studios. Therefore, in that case this Court held that the income derived by letting out the studios should be assessed under the head "business scheme". But the facts in the present case are different inasmuch as the assessee discontinued its business of publishing the newspapers from the year 1969 onwards. Though the assessee says that the publication work was being done through its sister-concern, the sister-concern is a separate entity and the business so done by the sister-concern cannot be considered as business done by the assessee itself. Therefore, this decision also would not be applicable to the facts of this case.

11. In New Savan Sugar & Gur Refining Co. Ltd. vs. CIT (supra) a question arose whether the income of the assessee-company was liable to be assessed under s. 12 of the Indian IT Act, and not under s. 10 of the said Act. In the assessment proceedings for 1955-56 the assessee's main contention was that the lease granted under the indenture of 15th March, 1948 was a lease of a commercial asset and, therefore, the income arising from the lease should be assessed under s. 10 of the IT Act and the assessee should be allowed depreciation and development rebate in accordance with cl. (via) and cl. (vib) of sub-s. (2) of s. 10 of the IT Act. While answering this question, the Supreme Court held that on the terms of the lease deed, that the intention of the appellant was to part with the entire machinery of the factory and the premises with the obvious purpose of earning rental income and not to treat the factory and the machinery as a commercial asset during the subsistence of the lease. The intention of the appellant was to go out of the business altogether so far as the factory and machinery was concerned w.e.f. 1st June, 1945. The income from the lease could not be assessed under s. 10, but was liable to be assessed under s. 12.

12. In CIT v. Central Studios Pvt. Ltd. (supra) a question arose whether the rents received by the assessee-company from the studio building in the accounting year would come under the head "income from property" or under the head "business income". While answering this question, this Court held that (1) each assessment year is a unit by itself and the decision rendered with reference to any particular year will not constitute res judicata or estoppel in relation to the assessment for the subsequent years, so as to bind either the assessee or the Revenue; (2) the rent received by the assessee could only be traced to the ownership of the building by the assessee and could not be said to be income from the business of film production, especially when the assessee had sold all the machinery required therefor and hence would fall under the head "income from property", and not under the head "profits and gains of business".

13. Thus on a careful consideration of the facts arising in this case, inasmuch as the assessee discontinued its business of printing and publishing the newspaper from 1969 onwards and the business of publishing the newspaper done by the sister-concern, it cannot be considered to be the business done by the assessee. Therefore, the income derived by the assessee by letting out the

machinery and the motor vehicles would relate to letting out the machinery and the motor vehicles as the owner of the same and the letting out would not in any way relate to the business. When the income is not earned in the course of the business, it cannot be assessed under the head "business income". One of the contentions put forward on behalf of the assessee was, when the asset is a commercial asset, the assessee can exploit the same in whichever manner he likes and the income derived from such asset should be assessed under the head "business income". As already pointed out, in the above cited decision of this Court, it was held that no asset could be a commercial asset from its inception. In order to consider whether an asset is a commercial asset, the assessee must do his business, by exploiting the said asset. In the present case, admittedly the business of publication and printing was discontinued from the year 1969 onwards, and, therefore, for the assessment year under consideration, it cannot be said that the assessee was doing any business and exploiting the assets in the said business. Therefore, the printing machinery and the motor vehicles cannot be considered to be commercial assets. In view of the foregoing reasons, we consider that there is no infirmity in the order passed by the Tribunal in directing to assess the income derived by letting out the machinery and the motor vehicles as income "from other sources". Accordingly, we answer Question No. 1 in TC No. 1824 of 1984 referred to us in the affirmative and against the assessee.

14. Question No. 2 in TC No. 1824 of 1984 relates to income taxable under s. 41(1) of the Act. In the course of assessee's business as dealer in shares, the assessee borrowed moneys from various share-brokers. The interest provided in the accounts in respect of such borrowals was claimed as a deduction and was allowed as such in computing the income of the assessee in the earlier years. Subsequently, at the time of settlement of accounts with share-brokers, the amount due to them on account of interest was settled at a figure lower than the figure provided in the accounts. As a result, the amounts thus given up were written back in the accounts as income, which amounted to Rs. 4,59,396 and Rs. 2,862. These sums were brought to tax under s. 41(1) of the Act. According to the assessee for s. 41(1) to apply the expenditure by way of interest incurred in the earlier years and allowed as deduction could be brought to tax only if it was recouped in cash or in any other manner whatsoever and that any other manner did not include settlement. It was further pointed out that the fiction contained in s. 41(1) would apply only to remission or cessation of a trading liability. It remains to be seen that there are two basic requirements for the application of s. 41(1) of the Act. One was there must be an allowance or deduction in the assessments for any year in respect of loss or expenditure or trading liability incurred by the assessee. The other was that subsequently during the previous year the assessee must have obtained whether in cash or any other manner whatsoever any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation, so that the remission or cessation so obtained on the value of the benefit accruing could be deemed as the income of the assessee. It is admitted that the amount of interest was allowed by the Department in the earlier years. Settlement was reached between the assessee and the share-brokers. On account of that, the liability to pay interest got extinguished. The assessee, therefore, got a benefit. This satisfied the second requirement according to the Tribunal. The submission made by the assessee that the assessee did not receive anything either in cash or in kind in the whole process and that there was no allowance or deduction in respect of loss or expenditure and that, therefore, s. 41(1) cannot be made applicable, was not accepted by the Tribunal.

15. In CIT vs. Rashmi Trading (supra), while considering the provisions of s. 41 of the Act, the Gujarat High Court held that the words "obtained, whether in cash or in any manner whatsoever, any amount in respect of such loss or expenditure" (incurred in any previous year) in s. 41 clearly refer to the actual receiving of that amount. The cash may be actually received or it may be adjusted by way of adjustment entry or a credit note or in any other form when the cash or equivalent of the cash can be said to have been received by the assessee. But it must be the obtaining of the actual cash, which is contemplated by the legislature when it used the words "has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss for expenditure".

16. In CIT vs. Bharat Iron & Steel Industries (1993) 199 ITR 67 (Guj) (FB) a Full Bench of the Gujarat High Court while considering the provisions of s. 41(1) of the Act, held as under :

> "The key words in s. 41(1) of the IT Act, 1961, are 'the assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof'. It is the obtaining in 'cash or in any other manner whatsoever, any amount..... or some benefit in respect of such trading liability....' which is contemplated by the legislature when it used the words 'has obtained'. Sec. 41(1) introduces a fiction by which where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequently during any previous year the assessee has obtained, whether in cash or in any other manner whatsoever any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him or the value of benefit accruing to him shall be deemed to be profits and gains of the business or profession and, accordingly, chargeable to income-tax as income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not. The fiction is an indivisible one. It cannot be enlarged by importing another fiction, namely, that if the amount was obtainable or was receivable during the previous year, it must be deemed to have been obtained or received during that year..... The amount may be actually received or it may be adjusted by way of an adjustment entry or a credit note or in any other form when the cash or the equivalent of cash can be said to have been received by the assessee. But it must be the obtaining of the actual amount which is contemplated by the legislature when it used the words 'has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure in the past'. In the context in which these words occur, no other meaning is possible".

17. According to the learned counsel appearing for the assessee, in view of the decision of this Court in CIT vs. N. Rudrappan (1983) 147 ITR 355 (Mad) only itemised losses which are incurred by an assessee and which are allowed or deducted in the IT Department in any given assessment year, would properly enter into a consideration for the purpose of the application of s. 41(1) of the IT Act, 1961, in any subsequent year if the assessee derives some benefit or remission with respect to that very item of loss, and, therefore, inasmuch as in the present case, the assessee has not received any

benefit by way of cash, the provisions of s. 41(1) of the Act cannot be made applicable. It remains to be seen that though the assessee obtained benefit in the earlier years on account of the amount due to the share-brokers to a larger extent of amount, which was reduced to a considerable extent on account of subsequent settlement and consequently the accounts were also adjusted in this regard. Hence, what is to be seen is what is the benefit that was derived by the assessee in the earlier years. As pointed out by the abovesaid two decisions in (1976) 103 ITR 312 (Guj) TC 19R. 330 and (1993) 199 ITR 67 (Guj) (FB) (supra) the benefit can be derived by way of book adjustment also. This was what had been done in the present case. Therefore, the assessee cannot complain that no itemised benefit was received in the present case while the assessee derived benefit under the settlement in which certain amounts were not payable by the assessee. Therefore, according to the facts arising in the present case, in the settlement arrived at between the share-brokers and the assessee, the assessee derived certain benefits, which were availed of in the earlier years. This benefit was adjusted in the books and the extra amount due to the share-brokers payable by the assessee was written off in the books. This would satisfy the requirement that the cash may be actually received or it may be adjusted by way of adjustment entry or a credit note or in any other form when the cash or equivalent of the cash can be said to have been received by the assessee. Therefore, it is not always necessary that the assessee should get benefit by way of cash for application of the provisions of s. 41(1) of the Act. Since this is a trading liability, which was written off in the year under consideration, application of the provisions of s. 41(1) is perfectly justified. This was also the view expressed by this Court and the Gujarat High Court in the decisions cited supra. Accordingly, we see that there is no infirmity in the order passed by the Tribunal in holding that the benefit received by the assessee by way of settlement and consequently through book entry and book adjustment, such benefit is liable to be taxed under s. 41(1) of the Act. In that view of the matter, we answer Question No. 2 in TC No. 1824 of 1984 in the affirmative and against the assessee.

18. Insofar as TC No. 940 of 1985 is concerned, the point for consideration is, whether the income derived by the assessee for providing air-conditioning services is assessable under the head "business" as claimed by the assessee. The assessee is the owner of the property at Mathura Road, Delhi, a portion of which was allotted to its sister concern, Indian Express Newspapers (Bombay) (P) Ltd. The other portions were let out to Hindustan Lever Ltd., Bharat Heavy Electricals Ltd., and Minerals and Metal Trading Corporation of India (P) Ltd. There was a tenancy agreement between the tenant and the assessee, who is the owner of the property. The assessee worked out the amount received towards hire charges for air-conditioning and also collected the consolidated rent received from the tenants as well as the sister-concern towards air-conditioning. The air-conditioning charges were separately reckoned and offered by the assessee as business income and the business was treated as rental income assessable under the head "property". According to the Department the air-conditioning charges could not be taken as business income and such income was assessed under the head "other sources".

19. The learned counsel appearing for the assessee submitted that supplying air-conditioning facility was done by the assessee by way of a business. It is not compulsory on the part of the tenant also to take the air-conditioning facility along with the tenancy rights. The learned counsel pointed out that the building alone was let out and not the air-conditioning facility. The tenants are having option either to accept the air-conditioning facility or refuse to accept the same. It was also pointed out that

in the rental bill, the charges for air-conditioning were mentioned separately and it has got nothing to do with the rent received by the assessee for letting out the premises. It was, therefore, submitted that the assessee inasmuch as the charges made for supplying air-conditioning facility separately, that should be assessed under the head "business income". The learned counsel also pointed out that the Tribunal in its order has stated that if the assessee can be able to show that the charges for air-conditioning facility was received separately or from the rent for letting out the property, it is open to the assessee to claim that the income derived by supplying air-conditioning facility should be assessed under the head "business income". In view of this factual position, the learned counsel appearing for the assessee submitted that the charges received for supplying air-conditioning facility should be assessed under the head "business. On the other hand, the learned senior standing counsel appearing for the Department pointed out that letting out of the business premises is not the business of the assessee. Air-conditioning is one of the facilities provided to the tenants and, therefore, it cannot be said that the assessee was doing business while supplying air-conditioning facility to the tenants. The learned senior standing counsel further pointed out that in order to ascertain whether the charges received for air-conditioning facility is income from business, we have to see whether there is any element of supply and demand so as to consider that the charges received for supplying air-conditioning would come under the head "business income". But in the present case, the relationship between the tenant and the landlord is through the tenancy agreement. Therefore, the rental income received along with the air-conditioning charges can only be considered as income from property, and therefore, it has got to be assessed under the head "other sources". The learned senior standing counsel also pointed out that central heating or air-conditioning of a multi-storeyed building nowadays is on amenity provided by the landlord for the tenant, and, therefore, the supply of air-conditioning facility cannot be considered separately as business done by the assessee.

20. We have heard the arguments advanced by the learned counsel appearing for the assessee as well as the learned senior standing counsel appearing for the Department on this aspect. A similar question come up for consideration before the Supreme Court in Karnani Properties Ltd. v. CIT . According to the facts arising in that case the assessee-company owned the Karnani Mansion, consisting of numerous residential flats and over a dozen shops. All these were let out to tenants who made monthly payments, which included charges for electric current, for the use of lifts, for the supply of hot and cold water, for the arrangement for scavenging, for providing watch and ward facilities as well as other amenities. It purchased high voltage current in a bulk, converted the same into low voltage current in its own power house within the premises and supplied the power to the tenants. It also maintained a separate water pump house and a boiler for the supply of hot and cold water to the tenants. The company provided electric lifts for the benefit of the tenants. For all these purposes, the assessee maintained a large number of permanent staff. The company claimed that the entire receipts from the tenants should be treated as income from business as it had been formed for carrying on the business of letting out flats and shops. On these facts, a question arose whether the Tribunal was justified in holding that the services rendered to the tenants by supplying electrical energy, hot and cold water and maintenance of lifts and other amenities, constituted a business activity of the assessee and as such the income arising therefrom was assessable under s. 10 of the Indian IT Act, 1922. While answering this question, the Supreme Court held that on the facts the services rendered by the assessee to its tenants were the result of its activities carried on

continuously in an organised manner, with a set purpose and with a view to earn profits, these activities were business activities and the income arising therefrom was assessable under s. 10. This decision was rendered because the business of the assessee was letting out the flats and, therefore, the amenities provided by the assessee while letting out the flats were also considered to be the part of the business done by the assessee. But according to the facts arising in the present case, letting out of the premises is not the business of the assessee. In such a case, the point for consideration is whether the service charges received for supplying central air-conditioning facility can be considered to be a business, de hors the letting out of the premises by the assessee.

21. In CIT v. Admiralty Flats Motel (supra) this Court, while answering the question whether the income derived by the assessee by letting out articles/furniture provided in Admiralty flats of Motel should be assessed under the head "business". According to the facts arising in this case one G, who was the Karta of an HUF consisting of himself, his wife and two minor daughters, had obtained certain properties, both movable and immovable, as his share in a partition of a large HUF of which he was a coparcener. Out of the properties so obtained by him, G gifted to his wife and two daughters, cash as well as immovable properties. Certain constructions were put up in the lands by utilising the gifted moneys. G and his wife entered into a partnership for the purpose of carrying on business as lodging house-keepers, and the two daughters were admitted to the benefits of the partnership. The income derived by the firm by letting out flats was claimed to be assessable only as income from property. On these facts, while answering the abovesaid question, this Court held that the intention of the parties in the present case was to run a business of lodging house-keepers. The firm was carrying on a business within the meaning of Partnership Act and was entitled to registration. The fact that the income from the business of running a hotel in the sense of the Partnership Act had been bifurcated and brought to tax under two heads, viz., "property" and "business", would not in any manner affect the question of registration of the firm. The letting out of furniture and other articles had been conceived of by the firm as a substantive and systematic and organised course of activity, and would, therefore, constitute business. It was linked with the incidental to the carrying on of the business of running a lodging house and hence the income from the letting out of the furniture and other articles would be of a business nature.

22. In CIT v. Lakshmi Co. (supra) a question arose whether the activities of the assessee constituted "business" as per s. 2(b) of the Indian Partnership Act, and whether the income returned by the assessee should be assessed as income under the head "business" or under the head "other sources". According to the facts arising in this case, the main business of the assessee-firm under the partnership deed was to take buildings on lease and let them as warehouses and godowns and realise rent therefrom. On these facts, while answering the abovesaid question, this Court held that the assessee's activity of taking premises on lease, putting up constructions as annexed thereto and letting them out to various tenants was in the nature of a business activity and not what an ordinary property owner would do. Consequently the firm was entitled to registration. Subletting the property could not be considered to be a trade in its popular or commercial sense. The assessee's activity was not also like that of a property owner as the assessee was not the owner of the property. Mere subletting could not be taken to be a business and hence the income was assessable under the head "other sources".

23. In CIT v. Indian Metal Metallurgical Corporation a question arose whether the Tribunal was correct in holding that the letting out of the building and provision of amenities are an inseparable part of the lease deed. According to the facts arising in this case, the assessee was the owner of a multistoreyed building. A part of the building in the first, second and fourth floors had been let out with amenities. The amenities included electrical fittings, water closets, etc. The assessee maintained two lifts in the building. The assessee contended that the income from the letting out of a portion of the property with amenities should be assessed under the head 'other sources'. On these facts, while answering the question, this Court held that the assessee had not hired out the machinery, plant or furniture belonging to the assessee along with the building. Therefore, the hire charges said to have been collected for the purpose of providing amenities and the rent for the building would not come under the purview of s. 56(2)(iii) of the IT Act, 1961. The Tribunal was not correct in coming to the conclusion that the income derived by the assessee from the first, second and fourth floors of the building was assessable under the head 'other sources'.

24. The facts on record in this case would go to show that the assessee let out a portion of the building to various tenants. The building was centrally air-conditioned. There are rental agreements between the tenants and the landlord. In the rental receipts, charges for supplying air-conditioning facility was said to be shown separately. According to the assessee, it is doing business while supplying air-conditioning facility to the tenants. There is no separate agreement for payment to the supply of air-conditioning facility. In the common rental receipt, the charges meant for supplying air-conditioning facility was shown separately. The assessee is not doing the business in letting out the premises. The main ingredient of a business is that there must be sale and purchase of the goods. In other words, when we want to do commercial transaction, there must be supply and demand of the goods. In the present case, while the building was let out, the air-conditioning facility was supplied along with other amenities, like electricity, lifts, water, etc. Under such circumstances we have to see whether supplying air-conditioning facility can be considered to be a business venture done by the assessee. According to the assessee, supply of air-conditioning facility is not a condition precedent for letting out the premises. The rental agreement was not shown to us so as to ascertain what are the conditions prescribed therein. The Tribunal has not recorded any finding with regard to what are the conditions prescribed in the rental agreement. In such circumstances, we have got to proceed on the arguments advanced by the learned counsel appearing for the assessee that the supply of air-conditioning facility is not a condition precedent for letting out the property. The fact remains that the premises were let out to the tenants with several amenities. In the several decisions cited supra, it was held that when a premises was let out, the various amenities provided by the owner of the premises cannot be considered to be under a separate business venture. When several facilities made available to the tenants according to those decisions, they are considered to be amenities. There is no separate bill for payment of charges for supplying air-conditioning facility, though it finds a place in the general rent receipt issued by the landlord. Under such circumstances, we are of the opinion that the supply of air-conditioning facility alone cannot be separated from other amenities provided by the landlord to the tenants and consider the same as a business venture done by the assessee. The assessee has not shown any other evidence to come to the conclusion that the assessee was doing business while supplying the air-conditioning facility to the tenants. According to the Department, in a multi-storeyed building in modern days providing centrally air-conditioned or centrally heated facility is an amenity, because without such

facility, it is not possible to reside or be in occupation of such premises. Considering all these facts, in the light of the judicial pronouncements cited supra, we hold that there is no infirmity in the order passed by the Tribunal in holding that the charges received for supplying the air-conditioning facility is to be assessed under the head "other sources", instead of under the head 'business income'. Accordingly, we answer the question referred to us in TC No. 940 of 1985 in the affirmative and against the assessee. No costs.