IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.160/Coch/2017 : Asst.Year 2011-2012
ITA No.161/Coch/2017 : Asst.Year 2012-2013
ITA No.162/Coch/2017 : Asst.Year 2013-2014

The Asst.Commissioner of Income-tax, Circle 2(1) Kochi.	Vs.	M/s.PTL Enterprises Ltd. 6th Floor, Cherupushpam Building, Shanmugham Road, Kochi – 682 031. **PAN : AABCP3839N.**
(Appellant)		(Respondent)

Appellant by : Sri.Alok Mitra
Respondent by : Sri.Abraham Joseph Markose

Date of Hearing : 01.05.2018		**Date of Pronouncement : 06.05.2019**

O R D E R

Per George George K, JM

These appeals at the instance of the Revenue are directed against three orders of the CIT(Appeals) concerning assessment years 2011-2012, 2012-2013 and 2013-2014.

2. The common issue is raised in these appeals. Hence, they were heard together and are being disposed off by this consolidated order.

3. The solitary issue that is raised in these appeals is whether the CIT(A) is justified in holding that the lease rent received by the assessee should be assessed under the head

`income from business' instead of `income from other sources' assessed by the Assessing Officer.

4. Brief facts of the case are as follows:

The assessee company was incorporated on 29.10.1999 under the 'Companies' Act 1956 to engage in the business of manufacturing of tyres. However on account of poor financial viability the assessee-company incurred losses. The entire net worth was eroded and was thus declared as a sick company under the Sick Industrial Companies Act, 1956 ("SICA"). Further on 17.04.1995 a rehabilitation scheme was prepared and sanctioned by Board for Industrial and Financial Reconstruction ("BIFR"). Under the scheme it was provided that Apollo would take over the assessee-company by subscribing to equity shares of assessee-company. It was further provided that;

a) Apollo will operate plant on an irrecoverable lease of eight years in consideration of lease rental of Rs.45.50 crores for 8 years;

b) Entire production to be sold in brand name of Apollo;

c) Apollo to invest for modernization and expansion of plant

d) No retrenchment of employees of plant;

e) VRS for employees of sale office and head office.

4.1 Pursuant to the above, according to the assessee for the period 1.4.1995 to 31.3.2003, the plant was under joint operation of Apollo and assessee. Under the arrangement,

assessee received a sum of Rs.5.65 crores annually; and apart from above, all expenses incurred for operating the plant were reimbursed by Apollo. It has been stated that after the expiry of 8 years the aforesaid arrangement had been renewed under various agreements, as stated here in under:

i) Agreement dated 30.06.2006 Period 1.4.2003 to 31.03.2004 Lease rent per year Rs. 5.75 crores.

ii) Agreement dated 20.7.2004 Period 1.4.2004 to 31.3.2005 Lease rent per year Rs.7.50 crores;

iii) Agreement dated 1.5.2006 Period 1.4.2005 to 31.3.2006 Lease rent per year Rs.10 crores;

iv) Agreement dated 22.05.2006 Period 1.4.2006 to 31.3.2010 Lease rent per year Rs.15 crores

v) Agreement dated 14.11.2007 Period 1.10.2007 to 31.3.2014 Lease rent per year Rs.25 crores. (Lease rent was revised w.e.f. 01.04.2019 to Rs.40 crore vide Appollo Tyre letter dated 31.05.2010)

4.2 The afore said lease rent for assessment year 2011-2012 to 2013-2014 has been received under the agreement dated 14.11.2007 and revised lease rent agreement. The lease rent so received for the assessment year 2011-2012 to 2013-2014 was declared as income from business by the assessee.The Assessing Officer, however, rejected the assessee's claim and brought to tax lease rent as "income from other sources" u/s. 56(2)(ii) of the Act.

5. Aggrieved by the orders of the Assessing Officer assessing the lease rent received by the assessee as `income from other sources', the assessee preferred appeals to the first appellate authority for assessment years 2011-2012 to 2013-2014. The CIT(A) allowed the appeals of the assessee. The CIT(A) directed the Assessing Officer to assess the lease rent received by the assessee as `income from business'. The CIT(A) also relied on the order of the ITAT in assessee's own case for the immediately preceding assessment year, viz., 2010-2011.

6. Aggrieved by the orders of the CIT(A), the Revenue has filed these appeals before the Tribunal. Identical grounds are raised in these appeals and they read as follows:-

> *1. The order of the Commissioner of Income Tax (Appeals)-I, Kochi in Appeal No.ITA 69/R-4/CIT(A)-II/2013-14 dated 13/02/2017 for the Assessment Year 2011-12 is opposed to law, weight of evidence, facts and circumstances of the case.*
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> *2. The learned Commissioner of Income Tax (Appeals) erred in holding that the amount of lease rent should be taxed as "Income from Business", overlooking the fact that the business of the assessee ceased to exist.*
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> *3. The learned Commissioner of Income Tax (Appeals) ought to have appreciated that the Hon'ble ITAT had held the impugned lease rent as income taxable under the head "Income from Other Sources" in A. Ys.2004-05 to 2009-10.*
>
> *4. The learned Commissioner of Income Tax (Appeals) is also erred in not appreciating the fact that the Revenue did not accept the findings of the*

Tribunal for assessment years 1996-97 to 2003-04 and appeals u/s.260A filed by the Revenue are pending on substantial questions of law in similar issues.

5. The learned Commissioner of Income Tax (Appeals) ought to have applied the provisions of section 56(2)(ii) in its spirit and substance and held the impugned lease rent as chargeable to tax under the head "Income from Other Sources" as laid down u/s.56(1)(U) of the Act.

6. The case laws relied upon by the CIT(Appeals) are distinguishable on facts, since a particulars case has to be viewed on its own factual matrix and applying other cases in generality is farfetched and devoid of any logic.

7. It is prayed that the orders of the learned Commissioner of Income Tax (Appeals) be reversed and that of the Assessing Officer restored.

8. For these and other grounds that may be urged at the time of hearing, it is requested that the order of the Commissioner of Income Tax(Appeals) may be set aside and that of the Assessing Officer restored."

7. The learned Departmental Representative relied on the grounds raised. The learned AR submitted that the issue in question is squarely covered by the order of the Tribunal in assessee's own case for assessment year 2010-2011 (supra).

8. We have heard the rival submissions and perused the material on record. Identical issue was considered by the Cochin Bench of the Tribunal in assessee's own case for assessment year 2010-2011 (supra). The Tribunal after

considering various orders of the Tribunal in assessee's own case for assessment year 1996-1997 to 2009-2010 (some of the orders of the Tribunal are in favour of the assessee and some are against the assessee), decided the issue in favour of the assessee by holding that the lease rent received by the assessee should be assessed as `income from business'. The relevant finding of the Tribunal in assessee's own case for assessment year 2010-2011 reads as follows:-

> *"8. We have considered the rival submissions and perused the material on record and orders passed by the authorities below.*
>
> *8.1 This ground relates to determination of "head of income" for taxability of sum of Rs.25 crores received from Apollo by the appellant company in the instant year.*
>
> *8.2 This issue came up for the first time before the Coordinate Bench of Tribunal in assessment years 1996-97 and 10997-98 and by a common order dated 14/12/2004, it was held as under:*
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>> "19. Now coming to the merit on the basis of the facts brought hereinabove, we are of the view that the issue has to go in assessee's favour. It is to be seen that the agreement is irrevocable for period of 8 years. As rightly contended by the learned authorized representative of the assessee, the assessee as an corporate entity, it continues to exist. The share value of the assessee has gone up. Merely additional account of Rs.110 crores has been invested by way of shares by ATL does not mean that the existence of the PTL has been diluted. The ATL has acquired share in PTL. Coming to the investment of Rs.70 crores in the plant and machinery, the assessee's representative submitted that the investments are reflected in the books of accounts of ATL. Mere change of administrative level officers/directors, as rightly contend by the representative of the assessee, does not mean that the corporate existence itself is disappeared. The stand of the revenue that the word used "take over does not support the revenue's case. It is for a limited period of 8 years. The direction of BIFR is to the effect that the production is by PTL and the entire production shall be lifted by ATL. The payment to the staff is made by PTL. The welfare schemes are also containing and operated by PTL. All these indicate that PTL is existing. The Kerala Government has supplied the electricity to PTL as per order dated 29/8/1995. The

> agreement by KSEB is with PTL. All these indicates that the existence of PTL as contended by the revenue does not ceased to exist."
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> 20. If there is no intention to continue the business and it is let out, then of course it cannot be treated as income from business. If the assessee because of certain difficulties, i.e. either by financially or for some other reasons is let out the land, plant and machinery to a third party for a limited period and receiving rent, such rent is to be treated as income from business. The cases relied upon by the assessee such as 20 ITR 451, 169 ITR 597, 195 ITR 3525, 138 ITR 18, 116 ITR 781, 266 ITR 106, 166 ITR 211, 211 ITR 370, 164 ITR 288 and 237 ITR 454 (mentioned in para 16 of this order) support the case of the assessee. In all these cases, the Hon'ble Supreme Court and various High Courts held that rental income received for a limited period by way of letting out plant and machinery because the assessee was unable to operate on account of some difficulties either obtaining the new materials or financial difficulties, etc., then that income has to be treated as income from business. The only limitation is that the assessee should have the present intention to revive the industry/activity in a future date when the difficulties ceased to exist or the assessee is in a position to over come the difficulties.
>
> 21. From the facts stated as above, there is nothing on record to show that the assessee had no present intention to revive its business at an appropriate time. Therefore, this issue is decided against the revenue and in favour of the assessee."

8.3 From the aforesaid it is apparent that income under the arrangement with Apollo was held to be taxable as "business income" in AY 1996-97 and 1997-98. It is also a matter of record that the aforesaid view was followed consistently in all the assessment years from 1998-99 to 2003-04. It was only when the appeal for AY 2007-08 came up that the coordinate bench held that such an income was held to be assessable under the head "income from other sources". It was held by an order dated 3.4.2012 as under:

> "6. We have heard the rival contentions and carefully perused the material on record. There cannot be any dispute that the question whether the assessee is having an intention to revive its business activity is a question of fact and the same is required to be considered every year on the basis of the facts and circumstances prevailing in that year. Accordingly, we are of the view that the decision rendered by the Tribunal in the earlier years cannot have binding effect in subsequent years. The undisputed facts are that the assessee has leased out its plant and machinery in the year 1995. Hence, while considering the claim of the assessee for the years ending 31.3.1996 and 31.3.1997, the Tribunal held that there

> is nothing on record to show that the assessee had to present intention to revive its business at appropriate time, as the gap between the year of closure and the years under consideration at that point of time was very narrow. However, we are concerned with the assessment year 207-08 and we have to consider the facts and circumstances prevailing as on 31.3.2007. By that date, about 12 years have passed and hence we are in agreement with ld. DR that the assessee has not brought on record any material to show that it has intention to revive the business activities. Though the ld. AR submitted that steps are being taken to revive the business yet we are unable to accept his contention for want of supporting materials. Accordingly, in our view, the Ld. CIT(A) was not correct in placing reliance on the decision of the Tribunal without appreciating the facts prevailing in the year under consideration. Accordingly, we reverse the order of the Ld. CIT(A) and restore the view of the Assessing Officer."

Similar view has been expressed for A.Y. 2004-05 to 2006-07 and 2008-09 to 2009-10."

8.4 Thus the background to this appeal is that various coordinate benches of the Tribunal have held for A.Ys 1996-97 to 2003-04 that income from Apollo is taxable as business income and for A.Ys 2004-05 to 2009-10, it is taxable as income from other sources.

8.5 The Assessing Officer has also relied upon the order of the Tribunal for AY 2004-05 to arrive at the conclusion that in the instant year income of Rs.25 crores is taxable as income from other sources. The order of the Tribunal dated 21.12.2012 for AY 2004-05 holds as under:

"5. Admittedly the original lease period had expired by the year ending 31.3.2003 and for the year under consideration, a new lease rent agreement has been entered. The issue whether the lease rent is assessable under the head income from business or income from other sources was considered by this bench in the assessee's own case in I.T.A. No.659/coch/2010 relating to the assessment year 2007-08, and this Bench has taken a view that the assessee has not proved its claim that it is taking steps to revive the business. The observations made by this Tribunal are extracted below for the sake of convenience:

"6. We have heard the rival contentions and carefully perused the material on record. There cannot be any dispute that the question whether the assessee is having an intention to revive its business activity is a question of fact that the same is required to be considered every year on the basis of the facts and circumstances prevailing in that year. Accordingly, we are of the view that the decision rendered by the Tribunal in the earlier years cannot have binding effect in subsequent years. The undisputed facts are that the assessee has leased out its plant and machinery in the year 1995. Hence, while considering the claim of the assessee for the years ending

31.3.1996 and 31.3.1997, the Tribunal held that there is nothing on record to show that the assessee had no present intention to revive its business at appropriate time, as the gap between the year of closure and the years under consideration at that point of time was very narrow. However, we are concerned with the assessment year 2007-08 and we have to consider the facts and circumstances prevailing as on 31.3.2007. By that date, about 12 years have passed and hence we are in agreement with ld. DR that the assessee has not brought o record any material to show that it has intention to revive the business activities. Though the ld. AR submitted that steps are being taken to revive the business yet we are unable to accept his contention for want of supporting materials. Accordingly, in our view the ld. CIT(A) was not correct in placing reliance on the decision of the Tribunal without appreciating the facts prevailing in the year under consideration. Accordingly, we reverse the order of the ld. CIT(A) and restore the view of the Assessing Officer.

6. The question whether the assessee is having an intention to revive its business activity is a question of fact and the same is required to be considered every year. Though the ld. AR claimed that the Government licences are still continuing in the assessee's own name, it has not proved the claim of the assessee that it had an intention to revive the business."

8.6 From the aforesaid it is apparent that order for AY 2004-05 relies upon the order for A.Y. 2007-08 to hold that income is taxable as income from other sources.

8.7 Before us the ld. AR has pointed out that for AY 2007-08 by an order dated 20.07.2012 u/s. 254(2) of the Act, it has been held as under:

"The ld. DR pointed out that the Tribunal did not consider other facts such as expenses, sales tax registration etc. while addressing the question and has taken the decision by considering the fact of time gap only, which is not correct. Since this Tribunal is dealing with the miscellaneous petition u/s. 254(2) of the Act, we are of the view that such new factors cannot be considered at this stage. Accordingly, we do not find any merit in the contentions of the assessee on this issue."

8.8 In the light of the above, the Ld. AR submitted that the precedent relied upon by the authorities below to negate the claim of the appellant did not consider the other facts such as expenses, sales tax registration etc. while determining the head for taxability of income received from Apollo and, has taken the decision by considering the fact of time gap, only. It was also highlighted that even the fact of time gap cannot be seen in isolation and, Tribunal itself in order for AY 2007-08 has held that intention to revive business activity is a question of fact and is required to be considered every year on the basis of facts and circumstances prevailing in that year.

8.9. To examine the above contentions, we take note that, for the instant year, assessee received lease rent of Rs.25,00,00,000/- and incurred expenditure aggregating to Rs.35.14 crores under the following heads which has been reimbursed by the Apollo:

Sr. No.	Particulars	Amount (Rs. In lacs)
I	EMPLOYEES	
i)	Salaries, wages and bonus	2,345.76
ii)	Contribution to Provident and other funds	183.5
iii)	Welfare Expenses	17.98
iv)	Gratuity	138.93
v)	Leave Encashment Provision	Nil
II	MANUFACTURING ADMINISTRATIVE AND SELLING	
vi)	Power and fuel consumption	807.20
vii)	Stores consumed	11.18
viii)	Rent	0.19
ix)	Rates and taxes	0.31
x)	Travelling and conveyance expenses	1.85
xi)	Legal and professional charges	3.43
xii)	Printing, stationery, postage, telegram & telephone etc.	2.17
xiv	Miscellaneous expenses	1.07
	Total	3514.00

8.10. Thus, undeniably substantial expenditure under various heads including i.e. salaries of Rs.23.46 crores; and power and fuel of Rs.8.07 crores had been incurred by the appellant company which sum stands reimbursed by Apollo. Moreover under the agreement itself the aforesaid expenditure is to be incurred by appellant and reimbursed by Apollo as the nature of the arrangement is of joint operation of the plant. The relevant portion of the agreement dated 14.11.2007 is extracted hereunder:

"Whereas both ATL and PTL carried out the joint operations as above for the period of eight years from 1.4.195 to 31.3.2003 and subsequently extended the same upto 31st March 2006 from time to time.

Whereas by an agreement dated 22nd May, 2006 the parties had agreed to execute the lease of the premises for a period of four years for Rs.15 crores per annum w.e.f. 1st April, 2006.

Whereas ATL has approached PTL that its has plans to make further investments in the plant of PTL and is desirous to extend the period of lease and have a firm eight years lease.

Whereas both the parties are desirous of continuing the lease operations arrangement for the present

Whereas PTL has requested ATL to enhance the lease rental and security deposit with effect from 1st October, 2007 which ATL has agreed."

8.11 The obligation of the appellant under the arrangement had been provided in clause 6 of the agreement which stipulates as under:

"6 In addition to payment of lease rental as aforesaid, ATL will reimburse to PTL actual expenses on account of the following also:
a) Power of fuel
b) Store and spares
c) Repair and maintenance
d) Personnel cost
e) Expenses under any other head relatable to production manufacture of tyres/tubes."

8.12 It was specifically also agreed that appellant was responsible for compliance of all other statutory rules/regulations including labour, welfare, legislations pertaining to the employees/workmen employed by it and engaged in the manufacturing activities at the plant of PTL. It is a matter of record and undisputed that risk relating to operation of plant is also with appellant.

8.13 Thus having regard to the aforesaid factual position we are of the considered opinion that appellant is engaged in commercial exploitation of assets of the plant by way of operating the plant for manufacture of tyres for Apollo. There is no sale of assets or termination of license or retrenchment of labour employed at the plant. The intention of the appellant is to be also gauged by the fact that in the instant year it had taken 20.78 acres of land on 90 years lease w.e.f. 24.5.2007 at a premium of Rs.519.50 lacs. Thus in our opinion there is no intention to exit the business carried on by the appellant company. Our above conclusion is also fortified from the approach adopted by the Assessing Officer whereby out of expenditure claimed of Rs.18.77 crores, he has allowed expenditure of Rs.2.59 crores under the following heads:

Sl. No.	Particulars	Amount claimed as per computation of income (Rs.)	Allowed by Assessing Officer (Rs. In lacs)
I	EMPLOYEES		
i)	Salaries, wages and bonus	9.42	9.42
ii)	Contribution to Provident and other funds	0.36	0.36
iii)	Gratuity	-	-
iv)	Leave Encashment Provision	-	-
II	MANUFACTURING ADMINISTRATIVE AND SELLING		
v)	Advertisement	3.19	3.19
vi)	Rent	6.72	6.72
vii)	Rates and taxes	5.76	5.76
viii)	Insurance	7.72	7.72
ix)	Travelling and conveyance	1.66	1.66

	expenses		
x)	Director's Fee	3.70	3.70
xi)	Payment to statutory auditors	1.47	1.47
Xii)	Legal and professional charges	25.39	7.17
xiii)	Printing, stationery, postage, telegram & telephone etc.	4.69	4.69
xiv)	Re-imbursement towards utilization of computer and other ATL facilities	34.45	34.45
xv)	Lease premium of lease hold land written off	-	-
xvi)	Miscellaneous expenses	0.72	0.72
xx)	Total(A) = (I+II	1 05.25	87.03
xxi)	Depreciation	8.24	-
xxii)	Interest and bank charges	646.26	-
xxiii)	Expenditure incurred in connection with gift of shares to the CEO of its subsidiary towards his contribution in developing health care constribution	945.69	-
	Total (B) = xxi+xxii+xxiii)	1600.19	-
	Additional item claimed in computation of income		
xxiv)	Bad debts written off	139.79	139.79
xxv)	Doubtful advances written off	23.23	23.23
Xxvi	Profit on sale of assets	8.60	8.60
	Total (C) = (xxiv + xxv + xxvi)	171.62	171.62
	Total (D) = (A+B+C)	s1877.06	259.35

8.14. Having regard to the above, it is evident that, Assessing Officer has allowed expenditure under the heads bad debts, advertisements, salaries, etc. incurred in the course of business of the appellant company. However, the Assessing Officer in the preceding year namely assessment year 2009-10, has allowed only expenditure incurred under the head depreciation of Rs.9,05,673/-, rates and taxes of Rs.7,37,564/-, insurance of Rs.9,31,398/- and rent paid of Rs.7,06,750/- u/s. 57(iii) of the Act. Thus, Assessing Officer himself has made a departure by allowing expenditure in the instant year which has been incurred wholly and exclusively for business of the appellant company.

8.15 Furthermore, even judicially speaking the Apex Court vide judgment rendered on 11.8.2016 in the case of Rayala Corporation (P) Ltd. vs. ACIT 386 ITR 500 held where a company had only one business i.e. leasing of property and earning rent therefrom that even if letting of property is not main business as per Memorandum of Association such income should be assessed as business income and not house property. In arriving at the above conclusion, the Hon'ble Apex Court followed the judgment dated 9.4.2015 of Chennai Properties and Investments Ltd. vs. CIT 373 ITR 673 (SC) wherein it was held that if an assessee is having a

house property and by way of business it is giving property on rent and if it is receiving rent from the said property as its business income, the said income, even if in the nature of rent, should be treated as "Business Income" because the assessee is having a business of renting his property and the rent which he receives is in the nature of his business income.

8.16. In the case of Chennai Properties and Investment Ltd. (supra), the Hon'ble Court followed the judgment of Karanpura Development Co. Ltd. v. CIT 44 ITR 362 (SC) wherein it has been held as under:

8.17 In fact in the case of Rayala Corporation (P) Ltd. (supra), it was undisputed position that assessee company had stopped its other business activities and was having only an activity with regard to the leasing its properties and earning rent therefrom and except leasing the company was not having any other business.

8.18 On the aforesaid factual matrix, it was concluded as under:
"As has been already pointed out in connection with the other two cases where there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub-letting is part of trading operation. The dividing line is difficult to find; but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it is possible to say on which side the operations fall and to what head the income is to be assigned."

"8. On the other hand, the learned counsel appearing for the respondent – Revenue made an effort to justify the reasons given by the High Court in the impugned judgment. The learned counsel also relied upon the judgment delivered by this Court in the case of M/s. S.G. Mercantile Corpn. (P) Ltd. v. CIT, Calcutta (1972) 1 SCC 465. According to him, the important question which would arise in all such cases is whether the acquisition of property for leasing and letting out all the shops and stalls would be essentially a part of business and trading operations of the assessee. According to the learned counsel appearing for the Revenue, leasing and letting out of shops and properties is not the main business of the assessee as per Memorandum of Association and therefore, the income earned by the assessee should be treated as income earned from House Property. He, therefore, submitted that the impugned judgment is just legal and proper and therefore, these appeals should be dismissed.

9. Upon hearing the learned counsel and going through the judgments cited by the ld. Counsel, we are of the view that the law laid down by this Court in the case of Chennai Properties (supra) shows the correct position of law and looking at the facts of the case in question, the case on hand is squarely covered by the said judgment.

10. Submissions made by the learned counsel appearing for the Revenue is to the effect that the rent should be the main source of income or the

purpose for which the company is incorporated should be to earn income from rent, so as to make the rental income to be the income taxable under the head "Profits and Gains of Business or Profession". It is an admitted fact in the instant case that the assessee company has only one business and that is of leasing its property and earning rent therefrom. Thus, even on the factual aspect, we do not find any substance in what has been submitted by the learned counsel appearing for the Revenue.

11. the judgment relied upon by the learned counsel appearing for the as squarely covers the facts of the case involved in the appeals. The business of the company is to lease its property and to earn rent and therefore, the income so earned should be treated as its business income."

8.19 Thus the ratio-descendi of the aforesaid judgment is that rental income is assessable as business income if the only income is from leasing of property even if leasing is not the main business of assessee. The agreement with Apollo is intra-vires the objects of the assessee as per Memorandum of association, which inter-alia includes the following:

"9 To bring, buy sell, manufacture, plant, cultivate, prepare, repair, convert, hire, alter, treat, manipulate, exchange, let on hire, import, export, dispose off and deal in machinery, implements, rolling stock plant, hard-ware, ores, metals, iron, carbon black rayon, hessian, stone materials, tools, appliances, apparatus, products, substance and articles of all kinds (whether referred to in this memorandum or not) which may seem to the company capable of being used or required for the purpose of any of the business which the company is expressly or by implication authorized to carry on or which are usually supplied or dealt in by persons engaged in any such businesses or which may seem to the company capable of being conveniently on in connection with the above or otherwise calculated directly or indirectly to enhance the value of any of the property and rights of the company for the time being.

17. To amalgamate, enter into partnership, or into any arrangement for sharing profits union of interest, co-operation, joint adventures, or reciprocal concessions or for limiting competition with any person or company carrying on or engaged in or about to carry on or engage in any business or transaction which the company is authorized to carry on or engage in or which can be carried on in conjunction therewith or which is capable of being conducted so as to directly or indirectly benefit the company.

20. To sell lease mortgage or otherwise dispose off the property, assets or undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular shares stock debentures or other securities of any other company whether or not having objects altogether or in part similar to those of the company."

8.20 Thus even as per the judgment of Apex Court in the case of Rayala Corporation (P) Ltd. (supra) and Chennai Properties and Investments Ltd. (supra) which are subsequent to the decisions of Tribunal holding income to be income from other sources, the income from arrangement with Apollo is business income.

8.21 Moreover it is also seen that the Assessing Officer has invoked section 56(2)(ii) of the Act and not section 22 of the Act which reads as under:

"56(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely:-

(ii) 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".

8.22 Section 56 of the Act being the residuary head of income under the frame work of the Act, can be resorted to only if an income is not chargeable under any other specific head of income. Section 56 of the Act which comes into play only if all other heads of income are excluded specifically.

8.23 The Apex Court has delved upon the issue in series of judgments. In the case of CEPT v. Shri Lakshmi Silk Mills Ltd. 20 ITR 451 (SC) the facts were that assessee company was a manufacturer of silk cloth and as a part of its business, it installed a plant for dyeing silk yarn. During the chargeable accounting period, January, 1, 1943, to 31st December, 1943, owing to difficulty in obtaining silk yarn on account of the war, it could not make use of this plant and it remained idle for some time. In August, 1943, it was let out to "a" person on a monthly rent. The question was whether such sum representing the rent for five months realized by the assessee was chargeable to excess profits tax as profits of business or was income from other sources and was, therefore, not chargeable to excess profits tax. It was held by the Apex Court that it was a part of the normal activities of the assessee's business to earn money by making use of its machinery by either employing it in its own manufacturing concern or temporarily letting it to others for making profit for that business when for the time being it could not itself run it and that the dyeing plant had not ceased to be a commercial asset of the business and the sum representing the rent for five months received from the lessee by the assessee was, therefore, income from business and was chargeable to excess profits tax. It was thereafter concluded as under:

"If a commercial asset was not capable of being used as such, then its being let out to others did not result in an income which was the income of the business, but it could not be said that an asset which was acquired and

used for the purpose of the business ceased to be a commercial asset of that business as soon as it was temporarily put out of use or let out to another person for use in his business or trade. The yield of income by a commercial asset was the profit of the business irrespective of the manner in which that asset was exploited by the owner of the business. He was entitled to exploit it to the best advantage and he might do so either, by using it himself personally or by letting it out to somebody else. The view that in order to constitute business income, the commercial asset must at the time it was let out be in a condition to be used as a commercial asset by the assessee himself was not correct."

8.24 Following the above, in the above case of Cit v. Vikram Cotton Mills :td. 169 ITR 597 (SC) it was held that when the intention was not to part with the assets, but to lease it out for a temporary period as a part of exploitation, it could not be said that no business was carried on and the income derived by the Company from letting out the machinery was only rental income. There was never any act indicating that the company never intended to carry on the business in the future. Also in the case of CIT v. Mysore Wine Products Ltd. 370 ITR 102 (Kar), it was concluded as under:

"In such circumstances, the income derived by way of lease rent from the letting out of its assets was assessable to tax under the head "Profit and gains of business". Whether a particular income is income from business or from investment must be decided according to the general commonsense view of those who deal with those matters in the particular circumstances and the conduct of the parties concerned."

In the above judgment it was noted that the Apex Court in the case of S.G. Mercantile Corpn. (P) Ltd. v. CIT has held that, the residuary head of income can be resorted to only if none of the specific heads is applicable to the income in question; it comes into operation only after the preceding heads are excluded.

8.25 In light of the above and having regard to the view clauses of the arrangement between Apollo and appellant it is apparent that the said, arrangement between the parties is that of contract manufacturing whereby the basic raw material for manufacture of the tyres is supplied by Apollo, and using the same the appellant manufactures the tyres for Apollo using its labour, fuel etc. Clearly, if the appellant fails to provide the labour, etc. the arrangement would not be workable, where there is a simple lease of a plant to another party. It is case where the appellant apart from letting Apollo constructively use its plant and machinery, is also managing the entire production activity in the plant by using its labour etc. and accordingly, there is a systematic activity undertaken by the appellant. Accordingly, it is submitted that the activity undertaken by the appellant is that of a business activity and accordingly, any income arising therefrom ought to be treated as business income.

8.26 We are also of the opinion that disclosure in the financial statement as "other income" or there is one segment of the assessee is an irrelevant consideration. It is well settled principle that treatment in books of accounts is not determinative of the nature and taxability of income as held in the case of Tuticorin alkali Chemicals and Fertilizers Ltd. v. CIT 227 ITR 172 (SC) and Kedarnath Jute Mfg. Co. Ltd. v CIT 82 ITR 363 (SC).

8.27 For the sake of completeness, it is stated that it is well settled law that if there is a new ground or a material change in the factual and legal position precedents do not have binding character. In the case of Bharat Sanchar Nigam Ltd. v UOI WP (Civil) 183/2003 (SC), it was noted as under:

"Even if the said orders are passed under the same provisions of law, it may theoretically be open to the part to contend that the liability being recurring from year to year, the cause of action is not the same; and so even if a citizen's petition challenging the order of assessment passed against him for one year is rejected, it may be open to him to challenge a similar assessment order passedpassed for the next year. In that case, the court may ultimately adopt the same view which had been adopted on the earlier occasion; but if a new ground is urged, the court may have to consider it on merits, because, strictly speaking the principle of res judicata may not apply to such a case. That in fact, is the effect of the decision of this court in the Amalgamated Coalfields Ltd. and Anr. V. the Janapada Sabha, Chhindwara (1963) supp. 1 SCR 172. In our opinion, the said general observations must be read in the light of the import fact that the order which was challenged in the second writ petition was in relation to a different period and not for the same period as was covered by the earlier petition."

But as far as a challenge to the same assessment order is concerned, it was held:-

"that if constructive res judicata is not applied to such proceedings a party can file as many writ petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by this Court would also be materially effected. We are, therefore, satisfied that the second writ petition filed by the appellant in the present case is barred by constructive res judicata."

8.28 It was finally concluded as under:

"15. The decisions cited above have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the

same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction."

8.29 In the instant case we have already highlighted the change in factual position and also the subsequent Apex Court judgments which have persuaded has to make an departure apart from the fact that a legal plea crucially determinative of the claim of the appellant had not been considered in the orders for AY 2004-05 and 2007-08.

8.30 We would like here to make a gainful reference to the case of Shyam Burlap Company Ltd. v. CIT 380 ITR 151 (Cal), where the assessee in the past history consistently shown rental income under the head "Income from House Property" which stood accepted as such. However for the first time in AY 1996-97 it claimed the income to be income from business which was negated by Tribunal, having regard to the past history of the appellant and applying to the principle of consistency. The Hon'ble Court following the judgment of Chennai Properties and Investments Ltd. (supra) and the fact that Memorandum of Association of appellant was not considered held that income is taxable as business income. It was held therein as under:

"15. There is another aspect of the matter. Though the appellant had relied on the Memorandum in support of its contention that it was carrying out business by letting out the property, however, neither the Assessing Officer nor the Tribunal, which had recorded the submission of the appellant in paragraph 2 of its order had considered the issue at all from that angle. Since the CIT(A) while allowing the appeal of the appellant had referred to the Memorandum, it was incumbent on the part of the Tribunal to deal with the said Memorandum instead of denying deduction on the ground that the assessee in the preceding years throughout had declared the rental income under the head "Income from house property". Though in Bharat Sanchar Nigam Ltd. (supra) it was held that "the courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position" (paragraph 20) and though as evident from the "order" in

Shambhu Investments (P) Ltd. 9supra) wherein it was held that "what has to be seen in what was the primary object of the assessee while exploiting the property", however neither the Assessing Officer nor the Tribunal had considered the facts in the light of the Memorandum."

8.31 In final analysis we hold that the appellant commenced the business but on account of poor financial viability the appellant company incurred losses and, eroded the entire net worth and was declared sick company under the Sick Industrial Companies Act, 1956. A rehabilitation scheme was prepared and sanctioned by Board for Industrial and Financial Reconstruction. Scheme envisaged joint operation of the plant on an irrecoverable lease of eight years in consideration of lease rentals; which has been extended from time to time. There was thus no intention of letting out the plant, building, machinery and licence to anyone. The set up of the business for carrying on the business. Further, when appellant entered the arrangement with Apollo, the intention was not to lease. The intention was to exploit the commercial assets through its expertise and derive income. There is no sale of assets or retrenchment of employees or even surrender of any licenses, registration etc. As per the agreement, it was the responsibility of the assessee to recruit labour for running the plant and meet all the labour law requirement in respect thereof, to purchase fuel and power required for running the plant, ensure the plant is properly insured, maintain the plant in working condition, undertake its repair and maintenance etc. The express so incurred by the appellant for the said responsibilities, were reimbursed by Apollo to it on actual basis. The production now by the appellant is in the name of Apollo and that too, to retain commercial viability in the operations and augment the financial position and at the same time bring about modernization and expansion in the plant.

8.32 Therefore, in view of section 56(2)(ii) coupled with the judgments of the Apex Court as aforesaid, the income should fall under the head 'profits and gains of business' and not from 'income from other sources'. Accordingly, the ground raised by the assessee is allowed."

9. In view of the co-ordinate Bench order of the Tribunal in assessee's own case for assessment year 2010-2011, which is identical to the facts of the instant case, we hold that the CIT(A) was justified in directing the Assessing Officer to assess the rental income received by the assessee under the head `business or profession'. It is ordered accordingly.

10. In the result, the appeals filed by the Revenue are dismissed.

Order pronounced on this 06th day of May, 2019.

Sd/-	Sd/-
(Chandra Poojari)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin ; Dated : 06th May, 2019.
Devdas*

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. The Pr.CIT-1, Kochi.
4. The CIT (A)-1, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin