2011:DHC:12066

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No. 686 OF 2009**

Reserved on: 25.8.2011
% Pronounced on: 18.11.2011

KOHINOOR FOODS LTD . . . **APPELLANT**
Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

VERSUS

COMMISSIONER OF INCOME TAX . . .**RESPONDENT**
Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE M.L. MEHTA

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. For orders, see ITA 685 of 2009.

ACTING CHIEF JUSTICE

(M.L. MEHTA)
JUDGE

NOVEMBER 18,2011
skb

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Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

VERSUS

COMMISSIONER OF INCOME TAX . . .**RESPONDENT**

Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

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Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

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CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE M.L. MEHTA

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. These appeals are preferred by the appellant/assessee under Section 260-A of the Income-Tax Act, 1961 (hereinafter referred to as 'the Act') questioning the validity of order passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') dated 18th May, 2007 whereby two appeals of the appellant herein, involving common issues pertaining to the assessment years 1994-95 and 1995-96 have been dismissed. We may point out at the outset that the original assessment was reopened, for these years by issuing notice under Section 148 read with Section 147 of the Act on the ground that the assessee was wrongly allowed deduction under Section 80-IA of the Act. However, the assessee has failed in its attempt before the CIT (A) as well as ITAT. Before we come to the nature of the challenge led and the question of law raised by the assessee in these appeals, it would be apposite to take stock of the relevant facts. For the sake of brevity we will disclose the facts of the assessment year 1994-95 as on the basis of these facts, the following common question of law pertaining to both the years can conveniently be decided:-

> "Whether, the Income Tax Appellate Tribunal was correct both in law and on facts in upholding the assumption

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> of jurisdiction of the Assessing Officer to frame an assessment by taking recourse to the provisions contained in Section 147 of the Income Tax Act, 1961?"

2. The appellant Kohinoor Foods Ltd (formally known as Satnam Overseas Limited) is a limited Company incorporated under the Companies Act, 1956 and is engaged in the business of manufacturing of Rice and also trades in pulses, Rice, Sesame Seeds, groundnut etc. It is also engaged in Exports of Rice, pulses etc. For the instant assessment year i.e. 1994-95, the appellant company had furnished a return of total income on 30th November, 1994 declaring therein a total income of ₹1,37,35,880/- alongwith its annual audited accounts. The return of income was processed under Section 143 (1) (a) of the Act on 31st March, 1995. Subsequently the appellant company revised its return of income on 30th November, 1995 declaring gross total income of ₹7,29,24,766/-, however after claiming deduction, under Chapter VI A of the Act, net taxable income was disclosed at NIL. The reason for revision of the return of income was that n the original return deduction u/s 80 IA of the Act was claimed after reducing deduction u/s 80HHC of the Act from the profits and gains from the business and profession whereas in the revised one

the same was computed as, a percentage to the profits from the business and profession before making any deduction u/s 80HHC of the Act. The appellant had also claimed a deduction U/s 80IA of the Act amounting to ₹1,96,66,528/-. The Assessing Officer passed an order u/s 143(1)(a) at ₹ 1,97,16,610/- on 30th September, 2006. The Assessing Officer did not allow deduction under Section 80IA of the Act for the reason that "in the absence of separate working of the industrial profit the deduction claimed under Section 80-IA is not allowable". The appellant company filed an appeal against the intimation u/s 143(1)(a) of the Act and the Commissioner of Income Tax (Appeals) by an order dated 6th August, 1997 held that the adjustment made by the Assessing Officer did not constitute a prima facie adjustment within the purview of Section 143 (1) (a) of the Act and allowed the appeal of the appellant company on this ground. The Commissioner of Income Tax (Appeals) filed an appeal before the Tribunal, which was dismissed by an order dated 18th October, 2002. The proceedings under Section 147 of the Act was initiated by issuance of a notice under Section 148 of the Act on 8th March, 1999 for the instant assessment year 1994-95. The reasons recorded (as per the order of the Commissioner of Income Tax (Appeals) and

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order of the Tribunal) for the initiation of proceedings under Section 147 of the Act are reproduced as under:-

> "Processing IN this case was completed under Section 143 (1)(a) on 30th September, 1996 a perusal of the profit and loss account show that the assessee has earned miscellaneous income amounting to ₹1,86,39,748/-. Deduction under Section 80-IA has been claimed on this miscellaneous income also, which cannot be said to have been derived from the industrial undertaking, in view of the Delhi High Court's decision in the case of CIT Vs. Cement Distributors, 208 ITR 355.
> I have reasons to believe that income has escaped assessment in as much as excessive deduction u/s 80IA has been claimed by the assessee. Issue notice u/s 148 of I.T. Act, 1961."

3. In response to the notice u/s 148 of the Act the appellant company filed the return of income though under protest on 26th July, 1999 declaring nil income after claiming deduction u/s 80HHC, 80-IA & 80G of the Act at the same figure as was done in the revised return of income. The Assessing Officer, however, by an order dated 18th December, 2000 framed an assessment under Section 143(3) read with Section 148 of the Act at ₹34,31,020/-. The Assessing Officer did not allow deduction under Section 80-IA of the Act on ₹1,86,39,748/- by holding the same cannot be said to have derived from industrial undertaking.

4. Being aggrieved from the order of assessment under Section 143(3) read with Section 148 of the Act dated 18th December 2000 the appellant filed an appeal before the Commissioner of Income Tax (Appeals), challenging the initiation of proceedings under Section 147 of the Act amongst other grounds. The Commissioner of Income Tax (Appeals)-X by an order dated 25th January, 2002, dismissed the appeal of the appellant and confirmed the order of assessment whereby he not only upheld the validity of the initiation of proceedings under Section 147 of the Act but also upheld the action of the assessing officer in excluding the amount of ₹1,86,39,748/-while calculating deduction under Section 80IA of the Act by holding that the same was not derived from industrial activity.

5. The appellant being aggrieved from the order of the Commissioner of Income Tax (Appeals), filed an appeal before the Tribunal. The Tribunal disposed off the appeal by the aforesaid impugned order dated 19th May, 2007 and in terms of the aforesaid order, the Tribunal upheld the initiation of reassessment proceedings under Section 147 of the Act, by holding as under:-

> "4.We have considered rival submissions and the case laws cited. In the assessment U/S 143(1)(a) which do not envisage consideration of any point and formation of any opinion for assessment

purposes. The powers are only to make certain prima facie adjustment based on the material available in the return of income itself. He cannot travel beyond what is mentioned in the return of income and documents accompanying thereto. Thus, it cannot be said that any opinion was formed by the AO as regards allowability or otherwise of the deduction U/S 80-IA in respect of various miscellaneous income like sale of import licence, rent, insurance claim, weighbridge charges etc. It is also a matter of fact that the details of miscellaneous income were not filed with the return of income. As per the copy of computation of income filed alongwith the return of income which are at pages 1 to 17 of the paper book, we find that even the details regarding claim of deduction U/S 80-IA is not furnished. Thus, it cannot be said that the AO has issued the notice U/S 148 on the basis of change of opinion. From the reasons recorded, it is found that the same have reasonable nexus for formation of an opinion that excessive deduction was claimed and allowed which amounts to income escaping assessment. We accordingly uphold the validity of assumption of jurisdiction by issue of notice U/S 148. As regards decision of Hon'ble Madras High Court in the case of Bapa Lal & Co. Export (supra), it is, seen from the said decision at page 45 of the report, the High Court has noted that the AO has issued the notice without assigning any reason. The mandatory requirement of Section 148 requires the AO to record reasons for the same In absence of reasons recorded, the AO cannot form an opinion that income has escaped assessment. However, the facts of present case are different. The AO has duly recorded the reasons before issue of notice U/S 148. As held by Hon'ble Supreme Court in the case of Raymond Woollen Mills, 236 ITR 34, the sufficiency of reasons are not required to be looked into. Since there is sufficient material for formation of a belief that income has escaped assessment, the issue of notice U/s 148 and assumption of jurisdiction U/s 147 has to be upheld."

6. On merits, the Tribunal sustained the orders of the Assessing Officer and the CIT (A) in the following words:-

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> "6.We have heard the counsels. We find that amount realized on sale of licence cannot be said as income derived from industrial undertaking for the purpose of computing deduction u/s 80-IA in view of the authoritative pronouncement by Hon'ble Supreme Court I the case of Sterling Foods (supra).
> 6.1 Similarly, the rent received and weighbridge income cannot be considered as income derived from an industrial undertaking. Reliance is placed on the decision of Hon'ble Karnataka High Court in the case of Siddaganga Oil Extraction P. Ltd. 201 ITR 968.
> 6.2 As regards miscellaneous income no details were furnished before the AO or CIT (A). We accordingly decline to interfere with the order of CIT (A) in this regard.
> 6.3 As regards insurance claim, the matter has been remitted back for re-examination with proper direction."

7. The appellant thereafter moved Misc. Application under Section 254 (2) of the Act which was also dismissed by the Tribunal vide orders dated 24th April, 2009. Thereafter, the present appeals were preferred. In ITA 685/2009, the assessee has assailed the order of the Tribunal whereby the Tribunal has upheld the initiation of reopening of the assessment. In the second appeal, the issue on merit is questioned.

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8. The facts disclosed above, would demonstrate that the original assessment order was passed under Section 143 (1) (a) of the Act. Notwithstanding the same, endeavour of the Mr. C.S. Aggarwal, learned Senior Counsel appearing for the assessee was that in the original assessment the issue pertaining to deduction under Section 80 IA of the Act was specifically dealt with. The Assessing Officer had not allowed this deduction which was allowed by the CIT (A) in appeal vide his orders dated 6th August, 1997 specifically discussing this issue and the ITAT has affirmed the same. In such circumstances, argued the learned Senior Counsel, notice under Section 148 of the Act was not permissible. Referring to the 'Reasons to Believe' Mr. Aggarwal, submitted that the Assessing Officer had relied upon the judgment of jurisdiction Court in ***CIT*** Vs. ***Cement Distributor***, 208 ITR 355 which judgment was rendered on 24th march, 1994. However, the original assessment order was passed much thereafter on 31st March, 1995 and, therefore, the aforesaid judgment was available with the Department but no notice under Section 143 (2) of the Act was issued and such a lapse on the part of the Department could not be rectified by it by adopting the recourse provided under Section 148 of the Act i.e. reopening the assessment.

Relying upon the judgments, it was argued that such a course of action was not permissible.

9. In ***KLM Royal Dutch Airlines*** Vs. ***ADIT***, 292 ITR 49 this Court held as under:-

> "The neat question which arises before us is whether on the commencement of assessment proceedings must they first be brought to their logical conclusion by framing an assessment before embarking on the proceedings as envisaged in Sections 147/148 of the IT Act; or more precisely stated, can resort to Section 147 be made even whilst the normal assessment proceedings are pending conclusion. To find the answer we must keep in perspective that every Return of Income filed under Section 139 may not result in its active and in-depth perusal or consideration by the AO as it may receive an automatic onward passage under Section 143(1). However, once an inquiry has been initiated by the AO, it cannot but result in either the Return being accepted as having been correctly computed by the concerned assessed, or for an Assessment being conducted and concluded thereon by the AO. The provisions of Section 147 would have no role to play at this stage of the proceedings. Once a Return of Income attracts the attention and scrutiny of the AO, it is his bounden duty to delve into every aspect thereof. The AO is sufficiently empowered to ask for all information necessary for framing the Assessment. The only fetter on the amplitude of his discretion is that the Assessment must be framed within the time limit set-down by Section 153 which, in substance, is two years from the end of the Assessment Year in which the income was first assessable or one year from

the end of the Financial Year. A perusal of its second sub-section makes it clear that proceedings under Section 147 are altogether different to those under Section 143. This distinction appears to have escaped the attention of the Revenue. Sub-section (2) stipulates that no order under Section 147 shall be made after the expiry of one year from the end of the Financial Year in which notice under Section 148 was served.

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Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the AO for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular AY, it would have to be assumed that since proceedings had not been opened under Section 143(2), the Return had been accepted as correct. It may be argued that thereafter recourse could be taken to Section 147, provided fresh material had been received by the AO after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the AO had attempted to travel the path of Section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law."

10. In ***CIT Vs. Ved & Co.*** 302 ITR 328 the Court held as under:-

> "There is no indication as to on what information or on what material the Assessing Officer harboured the recorded in the order of the Commissioner of Income-Tax Appeals, no new material is on record after the filing of the return and till the issuance of the notice under Section 147. The proceedings under Section 147 are not to be invoked at the mere whim and fancy of an Assessing Officer and it has to be seen in every case as to whether the invocation is arbitrary or reasonable. The decision of the Supreme Court in Chhugamal Rajapal's case (supra) is clearly applicable to the facts of the present case. In the case before the Supreme Court, the purported reasons recorded for reopening the assessment were *inter alia:-*
> *"It appears that these persons are name lenders and the transactions are bogus. Hence, proper investigation regarding these loans is necessary"*
> *The Supreme Court did not find that these were sufficient reasons for reopening the assessment. With regard to the sentence 'hence, proper investigation regarding these loans is necessary', the Supreme Court observed that this conclusion that there is a case for investigation as to the truth of the alleged transactions is not the same thing as saying that there are reasons to issue a notice under Section 148."*

11. He further submitted that the Tribunal wrongly relied upon the judgment of ***Rajesh Jhaveri Stock Brokers P. Ltd.*** 291 ITR 500. According to him, that judgment was not applicable as in

that case new material in the form of audit objection had come to the notice of the Assessing Officer which constituted fresh material and became the basis of issuance of notice under Section 148 of the Act. Learned Senior Counsel further argued that if the Assessing Officer wrongly allowed the claim under Section 80-IA of the Act, it was merely an error of judgment which would not confer any jurisdiction on the Assessing Officer to reopen the assessment, as held by the Division Bench of this Court in its decision dated 22nd November, 2010 in Writ Petition (C) 7515/2010 in the case entitled ***Ritu Investments Private Limited*** Vs. ***Dy. Commissioner of Income Tax*** in the following words:-

> "It is also worth noting, an error of judgment also does not confer such a jurisdiction on the assessing officer. In this context, we may fruitfully refer to the decision in ***Gemini Leather Stores*** v. ***Income-Tax Officer, B-Ward, Agra and others,***[1975] 100 ITR (SC) wherein it has been held that when the Income-tax Officer had all the material facts before him when he had framed the original assessment, he could not make recourse to Section 147(a) to remedy the error resulting from his own oversight. Similar view was expressed in ***Indian and Eastern Newspaper Society*** v. ***Commissioner of Income-Tax, New Delhi*** [1979]119 ITR 996 (SC)."

12. To buttress his submission that in the original assessment proceedings the issue was deliberated by the authorities, Mr.

Aggarwal pointed out that details of claim under this provision were furnished. He also pointed out that even in succeeding years when the assessment was made under Section 143 (2). After issuance of notice under Section 143(2) of the Act, deduction under Section 80 IA was allowed which would further demonstrate that the issue was dealt with.

13. Mr. Sabharwal, learned counsel appearing for the Department submitted, per contra, that when admittedly in the original assessment proceedings, intimation was sent only under Section 143 (1)(a) of the Act on the basis of which revised return was filed on 30th November, 1995. The reassessment proceedings were followed more so when categorical finding of fact was arrived at by all the three authorities below that the issue was not dealt with in the first instance, at all. Refuting the contention of Mr.Aggarwal predicated on the availability of the provision of Section 143 (2) of the Act, Mr. Sabharwal, submitted that the provisions of Section 143(2) make it clear that notice under Section 143(2) could be issued within 12 months from filing of the return i.e. 30th November, 1996. The reassessment notice was issued on 8th March, 1999. On the said date as stated above no notice under Section 143 (2) could have been issued. For framing

of assessment under Section 153(1) clearly provides for 2 years time limit for assessment in view of sub clause (a) from end of years of assessment i.e. upto 31st March, 1995 for assessment year 2004-05 or 1 year under sub clause (b) in case revised Return was filed i.e Revised return filed on 30th November, 1995 and hence time frame was upto 31st March, 1996. Keeping in view the time frame available for reassessment i.e. on the date of issue of notice for reassessment on 8th march, 1999 neither the notice under Section 143(2) could have been sent nor there was time limit available under Section 153 of the Act. In this regard he submitted that the Supreme Court in the case of ***Rajesh Jhaveri Stock Brokers P. Ltd.*** *(supra)* has clearly laid down that keeping in view Amendment to Section 147 post 1989 now only condition to be satisfied is limited to "Reason to believe' – 'for any reason whatsoever' besides if conditions of Section 147 are satisfied then it does not matter if after Section 143 (1) intimation has led to assessment under Section 143 (3) in following words:-

> ......The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the as they stood prior to such substitution. Under the old provisions of Section 147, separate clauses (a) and (b) laid down the circum-stances under which income escaping assessment for the

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> past assessment years could be assessed or reassessed. To confer jurisdiction under Section 147 (a) two conditions were required to be satisfied: firstly the assessing officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under Section 148 read with section 147 (a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at the hand is covered by the main provision and not the proviso.
>
> So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under Section 147 and failure to take steps under Section 143 (3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under Section 143 (1) had been issued.
>
> The inevitable conclusion is that the High Court has wrongly applied Adani's case [1999] 240 ITR 224 (Guj) which has no application to the case on the facts in view of the conceptual difference between Section 143(1) and section 143(3) of the Act....

14. He also refuted the contention of the assessee's counsel that the Assessing Officer himself allowed time of lapse for

issuance of notice under Section 143 (2) of the Act and, therefore, it was not permissible for him to take advantage of the same for enlarging the time for assessment by issuing notice under Section 147 of the Act. Relying upon the decision of ***Rajesh Jhaveri*** (supra) wherein it is held that as long as provisions of Section 147 are satisfied, the Assessing Officer is entitled to initiate reassessment proceedings. He further argued that it was misconceived on the part of the assessee to challenge the reassessment proceedings on the ground that no new material was found by the Assessing Officer. His submission in this behalf was that there was new material and it makes no differences as to whether the material is unearthed from the existing record. It is further submitted that new material should not be extraneous and further that even when the material was existing on record, the important fact is to see as to whether such material is considered by the Assessing Officer or not.

15. We have minutely considered the aforesaid submissions with reference to the material on record. The first and foremost poser is as to whether the Assessing Officer or CIT(A) had considered the issue in the original assessment proceedings? Our answer to that is in the negative. Notice was issued under Section 143 (a)

of the Act. No doubt, the assessee had preferred claim under Section 80-IA of the Act. However, the Assessing Officer did not examine the claim on merits at all without going into the issue. He rejected the claim at the threshold simply on the ground that there was no separate working of the industrial profit. Whether in law such a claim was admissible or not could be the central issue for allowing the deduction which was not even touched by the Assessing Officer. This was the reason furnished by the Assessing Officer, the CIT (A) also dealt with this aspect alone and held that the claim could not have been rejected only because of absence of spread of the industrial profit. Since the original assessment was completed under Section 143 (1 (a) of the Act and the claim under Section 80 IA of the Act came to be allowed under the aforesaid background without examining the merit of the same, the judgment of the Supreme Court in ***Rajesh Jhaveri*** *(supra)* is clearly applicable. The Tribunal is right in holding that the assessment under Section 143 (1) (a) of the Act does not envisage consideration of any point and formation of any opinion for assessment purposes. The powers are only to make certain prima facie adjustment based on the material available in the return of income itself. The Assessing Officer did not even travel beyond what is mentioned in the return of income and

documents accompanying thereto. It cannot be said that any opinion was formed by the Assessing Officer as regards allowability or otherwise of the deduction u/s 80-IA in respect of various miscellaneous income like sale of import licence, rent, insurance claim, weighbridge charges etc. Therefore, it cannot be said that it is a case of mere "change of opinion" when no opinion was formed in the first instance. We also do not find any merit in the submission of learned counsel for the assessee that there was no new material found for initiation of the proceedings. Mr. Sabharwal, is correct in his submission that new material need not be extraneous to the record and the touchstone is not where the material is to be found i.e. within the existing record or outside. What is important is whether such material was considered by the Assessing Officer or not. When the issue was not considered on merits and having regard to the judgment of this Court in Cement Distributor (supra) as per which such a claim under Section 80 IA was not admissible.

16. In ***A.L.A. Firms*** Vs. ***CIT***, 189 ITR 285 the Supreme Court has explained the legal position as under:-

> ".....This paragraph does not in any way affect the principle enumerated in the two Madras cases cited with approval in Anandji Haridas [1986] 21 S.T.C. 326. Even making

allowances for this limitation placed on the observations in Kalyanji Mavji, the position as summarised by the High Court in the following words represents, in our view, the correct position in law:-

"The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently come by the material from the record itself, then such a case would fall within the scope of Section 147(b) of the Act."

17. To the same effect is the judgment of this Court in ***Consolidated Photo and Finvest Ltd.*** *Vs.* ***Asst. Commissioner of Income Tax*** 281 ITR 391 holding that it makes no difference as to whether the material is unearthed from the existing record. The judgment relied upon by the learned counsel for the assessee are not applicable to this case.

18. In ***K.L.M. Royal Dutch*** (supra) and ***Ved and Co.*** (supra) the proposition laid down by this Court is that during the original assessment proceedings, reassessment notice should not be

issued. In the instant case the original proceedings were not pending but already over and, therefore, the recourse under Section 147/148 of the Act was valid and justified.

19. Insofar as denial of claim under Section 80 IA of the Act, on merits, is concerned, no grievance was raised by the appellant nor any question of law framed thereupon. We may only reiterate that the Tribunal has rightly held that such a claim was not admissible on miscellaneous income like sale of import licence, interest, weighbridge income, insurance claim etc. It is rightly disallowed having regard to the judgment of this Court in ***Cement Distributor*** (supra).

20. The questions of law are decided against the assessee resulting into the dismissal of these appeals.

21. No order as to costs.

ACTING CHIEF JUSTICE

(M.L. MEHTA)
JUDGE

NOVEMBER 18,2011
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