IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "G", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI O.P. KANT, ACCOUNTANT MEMBER

	I.T.A. No.2461/DEL/2016	
	A.Y. : 2010-11	
ASSISTANT COMMISSIONER OF INCOME, CENTRAL CIRCLE-3, NEW DELHI	VS.	M/S SPLENDOR LANDBASE LIMITED, F-38/2, SPLENDOR HOUSE, OKHLA INDUSTRIAL AREA, PHASE-II, NEW DELHI (PAN: AAECA3986E)
(APPELLANT)		**(RESPONDENT)**

AND

	C.O. NO. 215/DEL/2016 IN I.T.A. No. 2461/DEL/2016	
	A.Y. : 2010-11	
M/S SPLENDOR LANDBASE LIMITED, F-38/2, SPLENDOR HOUSE, OKHLA INDUSTRIAL AREA, PHASE-II, NEW DELHI (PAN: AAECA3986E)	VS.	ASSISTANT COMMISSIONER OF INCOME, CENTRAL CIRCLE-3, NEW DELHI
(APPELLANT)		**(RESPONDENT)**

Department by : Sh. S.S. Rana, CIT(DR)

Assessee by : Sh. Anil Kr. Chopra, Adv. & Sh. V.K. Garg, Adv.

ORDER

PER H.S. SIDHU : JM

The Revenue has filed this Appeal and Assessee has filed the Cross Objection against the impugned Order dated 19.2.2016

passed by the Ld. CIT(A)-23, New Delhi relevant to assessment year 2010-11. Since the issues involved in the Revenue's Appeal as well as in the Assessee's Cross Objection are inter-connected, hence, the appeal and cross objection were heard together and are being disposed of by this common order for the sake of convenience.

2. The grounds raised in the Revenue's Appeal read as under:-

"1. The order of Ld. CIT(A) is not correct in law and on facts.

2. On the facts and circumstances of the case, the Ld. CIT(A) erred in law in allowing the unabsorbed depreciation of Rs. 40,35,877/- disallowed by AO on account of carry forward loss.

3. The appellant craves leave to add, amend any / all the grounds of appeal before or during the course of hearing of the appeal.

3. The ground raised in the Assessee's Cross Objection read as under:-

"1. That the Ld. CIT(A) has erred on facts and in law in not allowing carry forward of business loss of Rs. 2,78,08,927/- claimed by appellant pursuant to its return filed u/s. 153A of the Act."

4. The brief facts of the case are that the Assessee is a company and is engaged in the business of real estate development. Assessee filed its return of income u/s 139 of the Income Tax Act, 1961 (hereinafter referred as the Act) for AY 2010-11 on 29.03.2011 claiming carry forward of business loss of Rs.3,31,15,331/- (including unabsorbed depreciation of Rs 40,35,877/-) and showing income from other sources of Rs 12,70,527/-. The said business loss and unabsorbed depreciation was not allowed to be carried forward in AY 2010-11 in the original assessment u/s 143(3) dated 11.3.2013.). Income was assessed at Rs 12,70,527/- being income from other sources. Subsequently pursuant to search and seizure proceedings and in compliance of notice u/s 153A, return filed originally u/s 139 were filed u/s 153A for AY 2010-11 declaring the same income/loss. In AY 2010-11, assessment was made u/s 153A r.w.s.143(3) vide order dated 31.03.2015 wherein carry forward of business loss of Rs 3,31,15,331/- (including unabsorbed depreciation of Rs 40,35,877/-) was not allowed on the ground that assessment u/s 143(3) already done wherein c/f forward of the loss was disallowed as return for AY 2010-11 was filed belatedly. Accordingly, assessment u/s 153A is done at income of Rs 12,70,,527/- same as income in order u/s 143(3). Later on, the other source income of Rs 12,70,527/- in AY 2010-11 was allowed

to be set off against business loss of Rs 3,31,15,331/- in rectification order u/s 154/153A dated 08.05.2015 and the net business loss of Rs 3,18,44,804 (business loss of Rs 2,78,08,927/- plus unabsorbed depreciation of Rs 40,35,877/-) was not allowed to be c/f. Aggrieved with the assessment order, the assessee appealed before the Ld. CIT(A), who vide his impugned order dated 19.2.2016 has observed that non-allowance of carry forward of business loss was restricted to Rs 2,78,08,927/- being business loss (excluding depreciation). Carry forward of depreciation of Rs. 40,35,877 was allowed and partly allowed the appeal of the assessee. Against the impugned order, the Revenue is in appeal before the Tribunal on the issue of carry forward of depreciation of Rs 40,35,877/- and the assessee has filed Cross objections on the issue of non-allowance of carry forward of business loss of Rs 2,78,08,927/-.

5. Ld. DR relied upon the order of the AO and reiterated the contentions raised in the grounds of appeal of the Revenue. He relied upon the decision of Hon'ble Delhi High Court in the case of CIT Vs Kabul Chawla [2015] 380 ITR 573 (Delhi) and ITAT Kolkata decision in the case of Tantia Constructions Ltd Vs DCIT 2016-TIOL-2027-ITAT-KOL.

6. On the contrary, the Ld. AR of the assessee has relied upon

the order of the Ld. CIT(A) as far as issue of allowance of c/f of unabsorbed depreciation is concerned, Ld. AR has also filed synopsis on 08.05.2018 on this issue. The relevant paragraph of the submissions are reproduced below:

Submissions in Departmental Appeal in AY 2010-11 relating to c/f of unabsorbed depreciation.

With regard to the issue of claim of carry forward of unabsorbed depreciation u/s 32 of Rs 40,35,877/- in 153A return for AY 2010-11, it is submitted that as unabsorbed depreciation is not a loss as it is governed by provisions of section 32(2), the restrictive provisions of section 80 does not apply to such unabsorbed depreciation as inter alia held in:

(i) CIT Vs. Govind Nagar Sugar Ltd. 334 ITR 0013 (Delhi HC)

(ii) CIT Vs. Haryana Hotels Ltd 276 ITR 0521 (P&H HC)

(iii) Brahamavar Chemicals Pvt. Ltd. Vs. CIT 239 ITR 867 (Kar HC)....

We quote from headnote in the case of ***CIT vs Govind Nagar Sugar Ltd. [2011] 334 ITR 13 (Delhi HC)*** *as under:*

"Held, dismissing the appeal, that Section 80 and 139(3) of the Act apply to business losses and not to unabsorbed depreciation which was exclusively governed by the provisions of Section

32(2) of the Act. That being so, the period of limitation for filing loss return as provided under Section 139(1) would not be applicable for carrying forward of unabsorbed depreciation and investment allowance. Under Section 32(2) unabsorbed depreciation of a year becomes part of depreciation of subsequent year by legal fiction and when it becomes part of the current year depreciation it was liable to be set off against any other income, irrespective of whether the earlier year's return was filed in time or not."

Accordingly, the Ld. CIT(A) has correctly allowed c/f of such unabsorbed depreciation. Refer para 4.3.3 at Pg 4 of CIT(A) order of AY 2010-11.

In view of the above, the departmental appeal deserves to be dismissed."

7. We have heard both the parties and perused the records, especially the impugned order. We find that Ld.CIT(A) has adjudicated the issues in dispute as under vide para 4.3.2 and 4.3.3 at page 4 & 5 of his impugned order as under:

> *"4.3.2 In this case the original return of income was filed on 29.03.2011 declaring loss at Rs. (3,31,15,33/-) which was assessed u/s 143(3) of*

the Act vide order dt. 11.03.2013. In this assessment order the business loss was not allowed to be carried forward since the return of income was filed beyond the due date. No appeal was filed against the order. Thereafter, consequent upon search and seizure operation conducted on 22.03.2013 and 23.03.2013 against the assessee, reassessment u/s 153A r.w.s. 143(3) of the Act was made on 31.03.2015 at the same income assessed u/s 143(3) dt. 11.03.2013 by disallowing the carry forward of loss once again. Subsequently, as mentioned above, the reassessment order was rectified on 08.05.2015. Admittedly, no fresh addition has been made in the present reassessment under consideration. In terms of the provisions of s. 153A of the Act the AO was duty bound to issue notice u/s 153A of the Act and make reassessment by considering any new incriminating material found as a result of the connected search, and since the AO did not find any new incriminating material she completed the assessment at the earlier assessed income. The action of the AO is

also in consonance with the order of the Hon'ble High Court of Delhi in Kabul Chawla (2015) 234 Taxman 300 (Del). Thus, in my view there is no grievance which need to be addressed in this appeal, which being infructuous is dismissed.

4.3.3 However, even in this order the carry forward of loss of Rs. 3,18,44,804/- was not allowed. The appellant has submitted that this reassessment was in consequence of return filed in response to notice u/s 153A, which statutorily being a return u/s 139(1) provisions of s. 80 of the Act do not apply and the assessee is eligible to carry forward of the loss. I do not agree with the contentions of the appellant since sub-section (3) of s. 139 very specifically mentions that the return is to be filed "within the time allowed under sub-section (1)" of s. 139, and the reference to s. 139 in clause (a) of s. 153A(1) simply lays down the procedure for assessment in cases where returns are filed in response to notice u/s 153A, and therefore I am not inclined to accept the argument of the appellant. However, the claim of the

appellant that the unabsorbed depreciation of Rs.40,35,877/- should be allowed to be carried forward since it is not covered by the limitation of s. 80 of the Act. The carry forward of unabsorbed depreciation is governed by sub-section (2) of s. 32 of the Act which is placed in Chapter – IV of the Act according to which the total income is to be computed, while s. 72 and s. 80 are part of Chapter – VI of the Act. The AO is directed to verify the claim of depreciation of Rs. 40,35,877/- and allow set off in the next / subsequent year(s). This ground is therefore partly allowed."

7.1 As regards the issue of carry forward of depreciation raised in Revenue's Appeal is concerned, we find that Ld. CIT(A) has observed that the claim of the assessee is that the unabsorbed depreciation of Rs. 40,35,877/- should be allowed to be carried forward since it is not covered by the limitation of s. 80 of the Act. However, the carry forward of unabsorbed depreciation is governed by sub-section (2) of S. 32 of the Act which is placed in Chapter –IV of the Act according to which the total income is to be computed, while s. 72 and s.80 are part of Chapter-VI of the Act. Therefore, Ld. CIT(A) has rightly directed the AO to verify the claim of

depreciation of Rs 40,35,877/- and allow set off in the next/subsequent years, which does not need any interference on our part, hence, we uphold the finding of the Ld. CIT(A) on this issue and accordingly reject the grounds raised by the Revenue. In the result, the Revenue's appeal is dismissed.

ASSESSEE'S CROSS OBJECTION

8. Apropos issue of carry forward of business loss of Rs. 2,78,08,927/- raised in the Assessee's Cross Objection is concerned, at the time of argument in the Cross Objection, ld. Counsel of the assessee has filed the following written submission and reiterated the contents thereof:-

"ASSESSE'S SUBMISSION IN CROSS OBJECTION

1. *The issue involved in Cross Objections of Appellant in AY 2010-11 relates to carry forward of business loss claimed in 153A return. The business loss suffered by the appellant in AY 2010-11 as claimed in 153A return is duly allowable to be carried forward even if the same was not allowed to be carried forward in original assessment u/s 143(3) for AY 2010-11 on account of delayed filing of original return. It is appellant's case that return under section 153A is deemed to*

be return under section 139(1) and as such section 80 does not apply.

Extract from Section 153A is as under:

"(1) Notwithstanding anything contained in section 139, section 147, section 148. Section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May 2003, the assessing officer shall –

2. *issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;"*
3. *The return filed u/s 153A deemed to be the return filed u/s 139(1). Accordingly, restrictive provisions of section 80 as to*

carry forward and set off of loss does not apply. In this regard, the appellant relies upon the ruling of Hon'ble Pune ITAT in the case of Sanjay Nandlal Vyas Vs ITO, (ITAT Pune) – ITA No 771 to 774/PN/2010 dated 23.12.2011 which directly covers the case of the appellant. In the said case, the Hon'ble ITAT has allowed the carry forward of increase in business loss claimed in 153A return by holding that provisions of section 80 does not apply to return accepted & assessed u/s 153A. The assessment under section 153A r.w.s. 143(3) of the Act has been framed on the basis of return filed in response to notice issued under section 153A and is accordingly within prescribed time. Return under 153A on the basis of which assessment was framed has replaced original return superseding earlier return and superseding the assessment based upon that original return. As return under section 153A was accepted thereunder, it is in time and carry forward of loss is allowable being not hit by section 80.

4. *A return filed under Section 153A takes the place of the original return under Section 139, for the purposes of all other provisions of the Act. Once the A.O. accepts the revised return filed under Section 153A, the original return under Section 139 abates and becomes non-est. In this regard, the*

appellant relies upon the decision of Jurisdictional Delhi High Court in the case of Principal Commissioner of Income-tax-19 Vs Neeraj Jindal [2017] 393 ITR 1 (Delhi). We quote from para 20 & 21 of the said case as under:

> *"20. Therefore, the position that emerges from the above-mentioned provision is that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. On similar lines, the Gujarat High Court in the case of Kirit Dahyabhai Patel v. Asstt. CIT [2015] 280 CTR 216, held that: "In view of specific provision of s. 153A of the I.T. Act. the return of income filed in response to notice under s. 153A of the I.T. Act is to be considered as return filed under s. 139 of the Act, as the AO has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under s. 271(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under s. 153A, if any."*
>
> *21. Thus, it is clear that when the A.O. has accepted the revised return filed by the assessee under Section 153A,*

no occasion arises to refer to the previous return filed under Section 139 of the Act. For all purposes, including for the purpose of levying penalty under Section 271(1)(c) of the Act, the return that has to be looked at is the one filed under Section 153A……"

5.In the case of ACIT, Central Circle -1(3), Chennai Vs. V.N. Devadoss [2013] 32 taxmann.com 133 (Chennai – Trib.) Hon'ble ITAT Chennai Bench has held that the returns filed by the assessee under Section 153A are to be treated as returns filed under Section 139(1) by virtue of the law stated in Section 153A(1)(a). We quote from the head notes as under:-

"Whether a return filed in pursuance of a notice issued under Section 153A is as good as a return filed under section 139 and more particularly under section 139(1) – Held, yes – Whether deduction claimed under section 80-IB(10) in a return filed under section 153A can be denied on ground that claim was not made earlier in a return filed under section 139(1) – Held, no [Paras 26 to 42] [In favour of assessee]"

The rider provided under law by section 80AC does not apply to the instant case and the returns filed by the assessee

under section 153A have been considered as returns filed under section 139(1) within time. As per section 80AC, no deduction under section 80IB shall be allowed unless return of income is furnished before due date under section 139(1). Accordingly, it was held in this case clearly that return under section 153A is as good as a return filed under section 139(1).

6. *Hon'ble Bombay High Court in the case of CIT vs B.G Shirke Construction Technology Pvt Ltd [2017] 79 taxmann.com 306 (BOM) held that:*

   "A return filed u/s 153A is a return furnished u/s 139 and therefore, provisions of the Act which apply to return filed in regular course u/s 139(1), would also continue to apply in case of return filed u/s 153A."

   In view of the above as the appellant's return was filed and assessed under section 153A and this return is treated as a valid return for the said assessment under section 153A, it is a return under section 139(1) filed by the appellant. Accordingly, the provisions of section 80 do not apply to the appellant and the appellant is eligible for carry forward of the business loss.

7. The order of the Ld. CIT(A) not allowing carry forward of loss in AY 2010-11 (CIT(A) order Pg 4, Para 4.3) is clearly erroneous. Case law cited by the appellant are not discussed and/or rebutted. Reliance by the Ld. CIT(A) on the decision of Hon'ble Delhi High Court in the case of CIT Vs Kabul Chawla [2015] 380 ITR 573 (Delhi) is total out of the box as the same is in context of addition in search assessment in the absence of incriminating material. Decision in Kabul Chawla does not discuss as to whether return under section 153A is deemed to be a return under section 139(1) and that accordingly, it is not hit by section 80.

As seen from the above, the claim of the appellant is duly covered by direct case laws of High Courts and Tribunal in favor. As such, the same deserves to be followed in appellant's favour.

In view of the above, it is prayed that the order of the Ld. AO disallowing the carry forward and order of Ld. CIT(A) sustaining the same deserves to be quashed."

8.1 Ld. Counsel of the assessee vehemently argued that the business loss suffered by the assessee in AY 2010-11 as claimed in 153A return is duly allowable to be carried forward and set off even

if the same was not allowed to be carried forward in original assessment u/s 143(3) for AY 2010-11 on account of delayed filing of original return. He further stated that it is assessee's case that return under section 153A is deemed to be return under section 139(1) and as such provisions of section 80 do not apply. In support of this contention, he reiterated the contents of the aforesaid written submission and relied upon the case laws cited therein and stated that the issue in dispute is squarely covered by the decision of the ITAT, Pune Bench in the case of Sanjay Nandlal vs. ITO (ITAT, Pune) ITA No. 771 to 774/PN/2010 dated 23.12.2011 wherein carry forwards of increase in business loss claimed in 153A return was allowed by the Bench by holding that restrictive provisions of Section 80 do not apply to return accepted and assessed u/s. 153A of the Act. He further stated that issue in dispute is also covered by the decision of the Hon'ble Delhi High Court in the case of Principal Commissioner of Income Tax vs. Neeraj Jindal (2017) 393 ITR 1 (Delhi) wherein the Hon'ble High Court held that once the assessee files a revised return under section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under section 139 of the Act. Therefore, he requested to follow the aforesaid decisions and directed the AO to allow the claim in dispute in favour of the

assessee.

8.2 On the other hand, Ld. DR relied upon the order of the authorities below. He relied upon the decision of ITAT Kolkata in the case of Tantia Constructions Ltd Vs DCIT 2016-TIOL-2027-ITAT-KOL to contend that the assessment once framed u/s 143(3), the same cannot be disturbed in proceedings u/s 153A in the absence of any incriminating material found in search. He thus argued that the action of the AO disallowing carry forward of loss in 153A assessment is proper, because the return was belated in accordance with provisions of section 139(3).

9. We have heard the rival submissions and perused the relevant records especially the case laws cited by both the parties. We have also gone through the provisions of section 153A of the Act which is reproduced as above. It is seen that section 153A starts with Non obstante clause which inter alia overrides the provisions of section 139. This shows that return filed under section 153A is a separate return. Ld. AR relied upon the judgment of Jurisdictional High Court of Delhi in the case of Principal Commissioner of Income-tax-19 Vs Neeraj Jindal [2017] 393 ITR 1 (Delhi) wherein it was held that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. The reference to revised

return u/s 153A in this decision refers to return u/s 153A. When the A.O. has accepted the return filed by the assessee under Section 153A, no occasion arises to refer to the previous return filed under Section 139 of the Act. For all purposes of the Act, the return that has to be looked at is the one filed under Section 153A. In assessee's case also, the return filed u/s 153A was accepted and assessed by the Ld. AO. Although carry forward of loss was not allowed in 143(3) assessment as the original return u/s 139 was belated, we are inclined to follow the ratio in the above decision of jurisdictional High Court to accept the contentions of the assessee that it is the return u/s 153A which is to be considered for allowability of carry forward of loss rather than the original return u/s 139.

9.1 We note that Ld. Counsel of the assessee also relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs B.G Shirke Construction Technology Pvt Ltd [2017] 79 taxmann.com 306 (BOM) and of Chennai ITAT in the case of ACIT, Central Circle - 1(3), Chennai Vs. V.N. Devadoss [2013] 32 taxmann.com 133 wherein claim of deduction made for the first time in 153A return was duly allowed holding that returns filed by the assessee under Section 153A are to be treated as returns filed under Section 139(1) by virtue of the law stated in Section 153A(1)(a). The said two

decisions also support the assessee's case that the return u/s 153A is to be treated as return filed u/s 139(1). In the case of V.N Devadoss (supra), deduction claimed u/s 80-IB in return filed u/s 153A was allowed even though such deduction was not claimed in a return filed u/s 139(1).

9.2 We further find merit in the submissions of Ld. Counsel of the assessee who pointed out that the proposition that in the absence of incriminating material found in search, the assessment u/s 143(3) cannot be disturbed as relied upon by Ld. DR citing the decisions of Kolkata ITAT in the case of Tantia Constructions and Hon'ble Delhi High Court in the case of Kabul Chawla is not applicable in this case**.** Ld. DR totally misdirected himself in relying upon said judgment in case of Tantia Constructions and Kabul Chawla as the same is in context of addition in search assessment in the absence of incriminating material. Decision in Tantia Constructions and Kabul Chawla does not discuss as to whether return under section 153A is deemed to be a return under section 139(1) and that accordingly, it is not hit by section 80. It was also pointed out by the Ld. AR that the said decision in Kabul Chawla is being contested in appeal before Hon'ble Supreme Court by tax department itself. We have also perused the said decision of Kolkata ITAT and found that there is no discussion in this case as to the aspects that section 153A has

non obstante clause overriding provisions of section 139. 153A return once accepted and assessed replaces the original return and that the return filed u/s 153A is deemed to be return u/s 139(1) and the restrictive provision of section 80 does not apply to 153A return. However, the decisions cited by Ld. AR including that of Jurisdictional High Court in case of Neeraj Jindal (supra) and ITAT, Pune Bench decision in the case of Sanjay Nandlal (supra) directly covering the case of the assessee were not discussed in the said Kolkata ITAT judgement. Ld. DR also relied upon the judgement of Hon'ble Delhi High Court in the case of CIT Vs Kabul Chawla [2015] 380 ITR 573 (Delhi). However, no contrary judgement was produced by the Ld. DR on this aspect.

9.3 We further find that on exactly similar facts and circumstances of the case, the ITAT, Pune Bench in the case of Sanjay Nandlal Vyas Vs ITO, (ITAT Pune) – ITA No 771 to 774/PN/2010 vide its dated 23.12.2011 has adjudicated the similar issue in favour of the assessee as under:-

> *"4. The relevant facts are that the assessee had filed return of income u/s 139(1) of the Act for the years under the appeals declaring losses for the A.Ys. 2002-03, 2003-04 and 2005-06 and declaring nil income for the A.Y. 2004-05. The assessee had again filed returns of income for the years under consideration in response to the notices issued u/s.*

153A of the Act. In these returns, the assessee had claimed interest expenditure on loan from a Credit Co-Operative Society which was not claimed in the returns of income filed u/s. 139(1) of the Act. The A.O. allowed the said expenditure while assessing loss and allowed carry forward of the loss only to the extent declared in the original return. The increase in loss as per returns filed in response to notices u/s. 153A was not allowed to be carried forward by the A.O. in view of the provisions of Section 80 of the Act. The A.O held that as per Section 80 of the Act, the loss which is not determined as per the provision of Section 139(3) of the Act cannot be carried forward. The Ld CIT(A) has upheld the action of the A.O with further observations that the assessee had filed returns of income in response to notices issued u/s. 153A of the Act beyond the time limit prescribed u/s. 139(5) for filing the revised return. Thus, the returns filed by the assessee in response to notices issued u/s. 153A of the Act cannot be regarded as revised returns replacing the original returns filed u/s. 139(1) of the Act. He accordingly did not accept the contention of the assessee that the original returns were replaced by the returns filed in response to the notices issued u/s. 153A of the Act.

5. Before us, the Ld A.R. while reiterating the above contentions made before the authorities below, submitted that undisputedly, returns of income u/s. 139(1) of the Act in the years under consideration were filed in time, hence the assessee was very much entitled to revise the returns of income during the prescribed time limit, hence the assessee had satisfied the provisions of Section 80 permitting carry forward of loss. He clarified that as per

Section 80, there is no such condition that only the loss claimed in the return filed u/s. 139(1) can be permitted to be carried forward. Merely because returns of income filed u/s. 153A by the assessee beyond the notice period, does not curtail to adopt those returns of income filed in response to the notices u/s. 153A as revised returns. He submitted further that finally determined loss in the assessment is to be carried forward as per the law. He placed reliance on the following decisions :

1. Sujani Textiles (P) Ltd. Vs. ACIT (2004), 88 ITD 31 (Mad.)

2. Escorts Mahle Ltd. Vs.DCIT (2009) 119 ITD 119 (Del.)

3. ACIT Vs. Mupnar Films Ltd. (2009) 116 ITD 217 (Indore)

4. ACIT Vs. Mahesh J. Patel (2004)91 TTJ 339 (Mum)

5. Kiran Nagji Nisar Vs. ITO (2008) 114 ITD 319

6. The Ld. D.R., on the other hand, tried to justify the orders of the authorities below on the issue. He submitted that loss determined in assessment cannot be said in pursuance to returns of income filed u/s. 139, but here assessment is on the returns of income filed u/s. 153A of the Act. He submitted that assessment u/s 153A made on the escaped income is based on seized material. Return of income filed in response to notices issued u/s. 153A cannot be treated as revised return. He submitted that wordings of S. 147 and S.153A are similar. He emphasized that returns filed in response to the notice issued u/s. 153A were filed beyond the time limit prescribed u/s. 139(5) of the Act. The ld D.R. pointed out that returns in response

to notice issued u/s. 153A on 11.7.2008 have been filed after 9 months on 30.3.09. He placed reliance on the following decisions :

1. Steri Mould Pvt. Ltd. Vs. DCIT, ITA No.3637/DEL/2009

2. Koppind (P) Ltd. Vs. CIT (1994) 207 ITR 228 (Cal).

7. In rejoinder, Ld. A.R. also clarified that provisions of Section 153A provide for fresh assessment of the income and the Ld A.R. also clarified that provisions of Section 153A provide for fresh assessment of the income and the assessee can also make a fresh claim. In this regard he relied upon the decision of Mumbai Bench of the Tribunal in the case of Eversmile Construction Co. Pvt. Ltd, ITA No. 4238/Mum/2010., A.Y. 2001-02 decided on 30th August 2011. A copy of this decision has been furnished for the perusal of the Bench and the other side.

8. Having gone through the decision of Mumbai Bench of the Tribunal in the case of DCIT Vs. Eversmile Construction Co. Pvt. Ltd. (Supra), we find that an identical issue has been decided therein. Relevant para Nos. 9 & 10 thereof are being reproduced hereunder :

> *"9. It is further important to note that the provisions of assessment in the case of search u/s. 153A etc. have been inserted by the Finance Act, 2003 with effect from 01.06.2003. These provisions are successor of the special procedure for assessment of search cases under Chapter XIV-B starting with section 158B. Whereas Chapter XIV-B*

required the assessment of "undisclosed income" as a result of search, which has been defined in section 158B(b), section 153A dealing with assessment in case of search with effect from 01.06.2003 requires the Assessing Officer to determine "total income" and not "undisclosed income".

10. If any deduction is claimed by the assessee in the proceedings u/s 153A that cannot be rejected simply on the ground that it was not claimed in the original assessment or was disallowed. The starting point of assessment is the amount of income declared in the return of income, which is further enhanced with the additions. We are unable to appreciate the qualitative difference between the two situations viz., the first in which the assessee files return in response to notice u/s. 153A disclosing lower income than the one originally assessed u/s. 143(3) and the second situation in which the income is disclosed at the increased level, that is, after considering the additions so made in the original assessment and then agitates during the assessment proceedings about the deductibility of the amount(s) which was/were not allowed earlier. Probably the second course is adopted

so as to prempt any move on the part of the Revenue to impose concealment penalty, if the addition is sustained in the assessment u/s. 153A. In our considered opinion when the Assessing Officer has to compute the total income of the assessee on the basis of return filed after considering the submissions made during the course of hearing before him. There cannot be any scope for arguing that the assessee has been rendered powerless to even lodge a claim in respect of which deduction was not allowed earlier. Here it is important to note that the total income is not reduced simply on the basis of making a claim. The Assessing Officer is fully empowered to consider the question of deductibility as per the provisions of the Act. If after going through such claim, he feels that addition is called for, he will obviously make addition and vice versa."

We find that in the above discussion after discussing the issue in detail, the Mumbai Bench has come to the conclusion that there is difference in wordings u/s. 158B(b) and Section 153A of the Act. Provisions u/s. 153A are successor of the special procedure for assessment of search cases under Chapter XIV B starting with Section 158B. Chapter XIV-B required the assessment of "undisclosed income" as a result of search, which has been defined in Section 158B(b) whereas Section 153A dealing

with assessment in case of search w.e.f. 1.6.2003 requires the A.O to determine "total income" and not "undisclosed income" under these background, the Bombay Bench of the Tribunal has held that when the A.O has to compute the total income of the assessee on the basis of return filed after considering the submissions made during the course of hearing before him, there cannot be any scope for arguing that the assessee has been rendered powerless to even lodge a claim in respect of which deduction was not allowed earlier. The A.O fully empowered to consider the question of deductibility as per the provision of the Act. If after going through such claim, he feels that addition is called for, he will obviously make addition and vice versa, held the Tribunal.

9. Almost similar are the facts in the present case before us as the assessee had claimed interest expenditure of loan from a Credit Co-Operative Society in the returns filed u/s. 153A which was not claimed in the returns of income filed u/s. 139(1) of the Act. The A.O had allowed the said expenditure while assessing loss. However, the increase in loss as per returns filed in response to notices u/s. 153A was not allowed to be carried forward in view of the provisions of Section 80 of the Act. The A.O. held as per Section 80 of the Act, the loss which is not determined as per the provisions of Section 139(3) of the Act cannot be carried forward. The Ld CIT(A) has upheld the action of the A.O with further observations that the assessee had filed returns of income in response to notice issued u/s. 153A of the Act which are beyond the time limit prescribed u/s. 139(5) for filing revised return. Hence, the returns filed by the assessee in response to the

notices issued u/s. 153A cannot be regarded as revised returns replacing the original returns filed u/s. 139(1) of the Act. Section 80 r.w.s. 139(3) of the Act laid down the procedure for submission of return for losses and claim for the same to be carried forward but does not mean that the A.O is not empowered to consider the question of deductibility as per the provisions of the Act; if after going through such claim he feels that it is necessary to consider for determining the total income in the assessment u/s. 153A r.w.s. 143(3) of the Act. The Madras Bench of the Tribunal in the case of Sujani Textiles (P) Ltd. Vs. ACIT (Supra) held that the procedural process provided u/s. 139 does not in any way affect Section 80 or vice versa. The equation between Sec. 139(3) and Sec. 80 is independent. Sec. 80 provides that the loss determined by an A.O in pursuance of the loss return filed u/s. 139(3) shall be carried forward for the succeeding A.Ys. The operation of Sec. 80 ends there. The inter-say relation between the Sub-section (1), (3) and (5) of Sec. 139 does not have an equation or inter-linkage with Section 80. Therefore, if the assessee has filed a loss return u/s. 139(3) within the period provided under the Act and if the assessee has filed a revised loss return under Sub-section (5) thereof again within the prescribed time limit, the A.O is bound to take cognizance of the revised return because the original return is replaced by the revised return, held the Tribunal. In the present case before us, undisputedly, the assessment u/s. 153A r.w.s. 143(3) of the Act has been framed on the basis of return filed in response to notice issue u/s. 153A of the Act. Hence, now it is not open to raise contention by the revenue that return was filed beyond the prescribed time period mentioned

in the notice issued u/s. 153A of the Act. The return of income filed in response to the notice u/s. 153A on the basis of which assessment in question has been framed thus has replaced the original return for determining the net income in the assessment u/s. 153A of the Act. Thus, in a sense, return filed in response to the notice issued u/s. 153A was a revised return and the assessment was re-assessment. For the purpose of levy of penalty u/s. 271(1)(c) of the Act, excess income in difference to the originally assessed income may be subject matter under the facts and circumstances of the case that the same was due to concealment of particulars of income or furnishing inaccurate particulars thereof, but for the purpose of assessment of net income, the return filed in response to notice u/s. 153A of the Act is the revised return superseding earlier return of income and the assessment based upon that original return of income. We thus following the ratio laid down by the Mumbai Bench of the Tribunal in the case of DCIT Vs. Eversmile Construction Pvt. Ltd. (Supra), hold that the A.O was not justified in denying the claim of carry forward of loss in question in the A.Ys. under consideration.

9.1 The decision of Delhi Bench of the Tribunal in the case of Steri Moulds Pvt. Ltd. (Supra) relied upon by the Ld. D.R to support his contention that only the loss declared in the return filed u/s. 139(1) can be carried forward, is not helpful to the revenue as facts therein are distinguishable. In that case assessee had filed the original return declaring positive income and no revised return was filed. Therefore the assessee made a claim in the assessment proceedings which resulted in positive

income converted to lose figure. Since assessee had not filed revised return, the Tribunal held that the loss cannot be permitted to be carried forward. However in the case of assessee before us, he had filed the return u/s. 153A declaring higher loss. Likewise, the decision of Hon'ble Calcutta High Court in the case of Koppind P. Ltd Vs. CIT(Supra) is also not helpful to the revenue as the same was in the context of S. 147, wherein in the reassessment proceedings only escaped income can be taxed. We do not agree with the submission of the Ld. D.R that wordings of S. 147 and S. 153A are similar. We are of the view that u/s. 147 only income which has escaped assessment can be assessed while S.153A permits fresh assessment of the return filed by the assessee. We thus while setting aside orders of the authorities below in this regard direct the A.O to allow the claim of carry forward of loss in question to the assessee. The Grounds are accordingly decided in favour of the assessee.

10. Consequently, appeals are allowed."

9.4 Keeping in view of the aforesaid discussions and respectfully following the decisions of Hon'ble Delhi High Court decision in the case of Neeraj Jindal (supra) and ITAT, Pune Bench decision in the case of Sanjay Nandlal (supra), as discussed above, we find merit in assessee's submissions that u/s. 153A return is deemed to be return u/s 139(1) and that restrictive provisions of section 80 do not apply to this case. It is the return u/s 153A which once accepted and assessed, replaces the original return u/s 139. Therefore, the

assessee is eligible for carry forward of business loss in dispute, hence, the AO is directed to allow the claim of carry forward of business loss in question to the assessee. Accordingly, the ground raised in the Cross Objection is decided in favour of the assessee and Cross Objection is allowed.

10. In the result, the Appeal filed by the Revenue stand dismissed and Cross Objection filed by the Assessee stand allowed.

Order pronounced on 06/06/2018.

Sd/-	**Sd/-**
[O.P. KANT]	**[H.S. SIDHU]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date 06/06/2018

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches