IN THE INCOME TAX APPELLATE TRIBUNAL
Pune Bench "B" , Pune

Before Shri I.C. Sudhir, Judicial Member
and Shri. G.S. Pannu, Accountant Member

<u>ITA Nos. 771 to 774/PN/2010</u>
<u>(Asstt. Years: 2002-03,2003-04,2004-05 & 2005-06)</u>

Sanjay Nandlal Vyas ... **Appellant**
198/99, MIDC Area, Ajantha Road,
Jalgaon 425003
PAN : AAIPV 7998J

v.

ITO, Central-2, ... **Respondent**
Nashik

Appellant by : Shri Sunil Pathak
Respondent by : Shri S.K. Singh
Date of Hearing : 16/12/11
Date of Pronouncement: 23/12/11

<u>ORDER</u>

<u>Per I.C. Sudhir, JM</u>

In all these appeals, the assessee has questioned first appellate order on the common ground that the Ld CIT(A) has erred in not allowing carry forward of loss (of Rs. 21,11,650/- in A.Y. 2002-03, Rs. 16,27,640/- in A.Y. 2003-04, Rs. 9,34,330/- in A.Y. 2003-04 and Rs. 54,59,930/- in A.Y. 2005-06) without appreciating that as per law, the assessee was entitled to carry forward the same (Ground No. 1).

2. In Ground No. 2, the assessee has questioned the first appellate order on the basis that Ld CIT(A) has erred in holding that the assessee had not filed the return in response to notice u/s. 153A within the time limit specified and accordingly, the assessee was precluded from carry forward of loss pertaining to the year.

3. In Ground No.3, the assessee has questioned first appellate order on the basis that the Ld CIT(A) ought to have appreciated that the original returns were

filed by the assessee within the due date and therefore, there was no reason to deny the carry forward of loss.

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. 153 A 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 317 (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 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 is 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.

The order is pronounced in the open Court on 23rd December, 2011.

Sd/-	**Sd/-**
(G.S. PANNU)	**(I.C. SUDHIR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Pune, dated the 23rd December, 2011

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Copy of the order is forwarded to :

1. The Appellant
2. The Respondent
3. The CIT,Central, Nagpur
4. The CIT(A)-I, Nashik
5. The D.R. "B" Bench, Pune
6. Guard File

By order

Senior Private Secretary
Income Tax Appellate Tribunal
Pune