

**आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI  
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.6824 & 6825/Mum/2016  
(निर्धारण वर्ष / Assessment Year: 2007-08 & 2009-10)

Deputy Commissioner of Income-tax , Central Circle 3(1) , Central Range-3 R.No. 1924 19 <sup>th</sup> Floor, AIR India Building, Nariman Point, Mumbai- 400021	<b>बनाम/</b>  v.	M/s. Wind World Wind Farms (Rajasthan) Ltd., A-9, Enercon Tower, Veera Desai Road, Veera Industrial Estate, Andheri (W), Mumbai-400053
स्थायी लेखा सं./PAN :AAACE8156G		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )
Revenue by :		Shri. V. Vidhyadhar
Assessee by:		Shri. A.K Ghosh

सुनवाई की तारीख /**Date of Hearing** : **10-05-2018**  
घोषणा की तारीख /**Date of Pronouncement** : **10 -05-2018**

**आदेश / ORDER**

**PER RAMIT KOCHAR, Accountant Member**

These two appeals, filed by the Revenue, being ITA No. 6824 & 6825/Mum/2016 for assessment years 2007-2008 and 2009-10 respectively are directed against common appellate order dated 12.08.2016 passed by learned Commissioner of Income-tax (Appeals)-51, Mumbai (hereinafter called "the CIT(A)") for assessment years 2007-2008 and 2009-10 respectively, the appellate proceedings had arisen before learned CIT(A) from the separate orders both dated 24.03.2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 153A r.w.s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. First we shall take up appeal of the Revenue in ITA no. 6824/Mum/2016 for assessment year 2007-08. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai reads as under:-

*“On the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in allowing depreciation in respect of foundation/civil work at the rates applicable to the windmills.”*

3. The assessee is engaged in the business of establishing wind farms to generate electricity through wind energy. A search & seizure action under section 132 of the Income-tax Act, 1961 was carried out on 14.3.2013 in the premises of M/s Enercon India Limited (EIL) and its group of companies and at the residences of its main persons. The assessee company is one of the group companies of M/s Enercon India Ltd (now known as M/s Wind World (India) Ltd.) who was covered under the search conducted by Revenue u/s 132. The AO observed that for the year under consideration, the assessee claimed additional depreciation at the rate of 80% on Plant & Machinery , which includes depreciation amounting to Rs. 3,37,62,448/- @ 80% on civil work(foundation) , while the normal rate of depreciation for building is 5%. The AO while framing assessment u/s 143(3) had already made an addition on this issue vide orders dated 28.07.2013. The said addition was deleted by Ld. CIT(A) as well as by tribunal. The AO observed that Revenue has filed an appeal before the Hon'ble Bombay High Court which is pending. Thus to keep the issue alive the AO made an addition to the tune of Rs. 3,37,62,448/- vide assessment order dated 24.03.2015 passed u/s. 143(3) r.w.s. 153A of the 1961 Act.

4. The matter went in appeal before learned CIT(A) at the behest of assessee .The Ld. CIT(A) vide appellate orders dated 12.08.2016 granted relief to the assessee , by holding as under:-

*“ During the appellate proceedings, it is pointed out by the assessee that the issue relating to the claim of depreciation for civil construction work including foundation has been decided by CIT(A) and Hon'ble ITAT in favour of the assessee in case of a group company, M/s. Enercon Wind Farm (Jaisalmer) P. Ltd., wherein it was held that the depreciation on the civil construction is allowable at the same rate as is allowed for the wind mill. It is further pointed out by the assessee that these facts have been brought to the notice of the AO but the AO allowed the depreciation at lower rate only because the department preferred an appeal before the Bombay High Court against the Hon'ble ITAT order, which is not yet disposed of. I have considered*

*the arguments of the assessee and have gone through the assessment order wherein the factum of Hon'ble ITAT decision in favour of the assessee on this issue is recorded by the AO. In view of the binding decision of the Hon'ble ITAT, AO is directed to allow the depreciation in respect of the foundation/civil work at the same rate as is applicable in case of wind mill in case of both the assessment years."*

5. Aggrieved by the appellate order dated 12.08.2016 passed by learned CIT(A), the Revenue has filed an appeal before the tribunal.

The Ld. Counsel for the assessee at the outset submitted that the issue is covered in favour of assessee by tribunal order in ITA no. 6392/Mum/2010 for AY 2007-08 vide orders dated 21.12.2011 w.r.t. Enercon Wind Farms (Rajasthan ) Private Limited . It was submitted that the assessee company name earlier was 'Enercon Wind Farms ( Rajasthan ) Private Limited' which stood changed to 'Wind World Wind Farms (Rajasthan ) Limited' w.e.f. 01-03-2013. The learned counsel for the assessee also drew our attention to the orders of tribunal in ITA no. 6402 to 6405/Mum/2010 for AY 2004-05 to 2007-08 in the case of Group Company namely 'Enercon Wind Farms (Karnataka) Private Ltd.' and also decision of the tribunal in ITA no. 6390/Mum/2008 and 6391/Mum/2010 for AY 2006-07 and 2007-08 in the case of group Company namely 'Enercon Wind Farms (Jaisalmer) Private Ltd.'. Similarly it is pointed out by Ld. Counsel for the assessee that decision of the tribunal in the case of group Company in 'Enercon Windfarms (Jaisalmer) Private Ltd' in ITA no. 2666/Mum/2009 for AY 2004-05 is in the assessee favour , vide orders dated 04.06.2010. The said orders are placed in the file. The learned DR fairly conceded that issue is decided by tribunal in assessee's favour and Hon'ble Bombay High Court is seized of the matter.

6. We have observed that the order dated 21.12.2011 of the tribunal in ITA no. 6392/Mum/2010 for AY 2007-08 is in favour of 'Enercon Wind Farms (Rajasthan) Private Ltd' . The assessee is contending that name of the said company 'Enercon Wind Farms (Rajasthan) Private Limited' stood changed to 'Wind World Wind Farms (Rajasthan) Private Limited' w.e.f. 01-03-2013. The assessee was directed by the Bench to file fresh certificate of Incorporation consequent upon change of name issued by Ministry of

Corporate Affairs office of Registrar of Companies , Government of India with copy to Learned DR. The assessee has duly filed copy of fresh certificate of Incorporation consequent upon change of name issued by Ministry of Corporate Affairs, Registrar of Companies ,Government of India, Mumbai dated 01.03.2013 to evidence that the aforesaid change of name of the assessee company is effective from 01.03.2013 which was approved vide SRN B67790733 dated 01-03-2013 (CIN U40100MH1999PTC123424) , the said fresh certificate of incorporation is placed in file.

7. We have observed that the assessee is engaged in the business of establishing wind farms to generate electricity through wind energy . We have observed that allowability of depreciation on civil work (foundation) of windmill at the same rate of depreciation as is applicable on wind mill is decided in favour of the assessee by tribunal decision(s) in the case of assessee as well group companies namely Enercon Wind Farms (Karnataka) Private Limited and Enercon Wind Farms (Jaisalmer) Private Limited , which are reproduced here under:-

*“ ITA No. 6402 to 6405/Mum/2010 filed by the Revenue are directed against the order dated 30.06.2010 of the Commissioner of Income Tax (A)- 16, Mumbai relating to Assessment Years 2004-05 to 2007-08 respectively.*

*ITA No. 6390 & 6391/Mum/2010 filed by the Revenue are directed against the order dated 30.06.2010 of the Commissioner of Income Tax (A)- 16, Mumbai relating to Assessment Years 2006-07 & 2007-08 respectively. ITA No. 6392/Mum/2010 filed by the Revenue is directed against the order dated 30.06.2010 of the Commissioner of Income Tax (A)-16, Mumbai relating to A.Y. 2007-08. Since identical issues are involved in all these appeals, therefore, these appeals were heard together and are being disposed of by this common order for the sake of convenience.*

**ITA No. 6402/Mum/2010 (A.Y. 2004-05).**

*2. The only effective ground raised by the Revenue in this appeal reads as under:-*

*“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowances made by the Assessing Officer regarding the claim of depreciation to the extent of Rs. 3,37,62,448/- on civil work, erection and commissioning of wind mill without appreciating the facts and circumstances of the case and in law.”*

*2.1 Facts of the case in brief are that the assessee company is engaged in the business of generation of power by wind energy through wind farms and sale thereof. During the year under consideration the assessee has commenced generation and sale of commercial power. The A.O. asked the assessee to furnish*

*details of assets owned by it. After going through the details of various assets, the A.O. asked the assessee to justify its claim of depreciation on foundation, erection and commissioning @ 80%. According to the A.O. the assessee company is not entitled to depreciation @ 80% on civil work and it is entitled to depreciation @ 5% only.*

*2.2 In appeal, the Id. CIT(A) relying on the decision of the Tribunal in the case of sister concern of the assessee namely Enercon Windfarms (Jaisalmer) Pvt. Ltd. Vide ITA No. 2666/Mum/2009 order dated 4.6.2010 for A.Y. 2004-05 decided the issue in favour of the assessee by holding as under:-*

*"I have considered the submissions of the appellant, the order of the A.O. and the facts of the case that wind mills energy devices is eligible for 80% depreciation as per the provision of the I.T. Act and is claimed by M/s PFC who is the owner of the wind mills in this case. The dispute is regarding the base structure i.e. the foundation on which these wind mills are installed. The appellant has also claimed depreciation on the expenditure incurred for pre-installation charges, loan processing charges and the foundation works. In this regard, similar addition was made by the Assessing Office in the case of appellant's sister concern viz. M/s Enercon Wind Farms (Jaisalmer) Pvt. Ltd. For A.Y. 2004-05 and the said addition was confirmed by my predecessor. On further appeal, the Hon'ble I.T.A.T. vide its order ITA No. 2666/Mum/2009 dated 4th June 2010 has inter alia held as under:-*

*"In view of our finding above and after considering the case laws cited above, we are of the opinion that the basement constructed by the assessee to install and withhold the heavy windmill is part and parcel of the windmill and without the specially designed basement, the windmill cannot stand. Therefore, it is to be treated as plant and higher depreciation claimed by the assessee has to be allowed. When the assessee has taken a windmill on lease and constructed the basement for installing the windmill for generating power, denial of depreciation to the basement constructed by the assessee is not justified in view of our finding that the basement is part and parcel of the windmill and is to be treated as plant. The intention of the legislature is to grant higher depreciation to encourage the entrepreneurs who generate power through windmill. In the present case, though the assessee has taken the windmill on lease, the assessee had incurred huge expenditure to construct the basement to install the windmill and actually running the windmill. Hence, the assessee is eligible for higher depreciation."*

*Since, the Hon'ble I.T.A.T. is the last fact finding authority and the finding of the Hon'ble Tribunal is binding on the lower authorities, therefore, it is held that the foundation and its material like steel, reinforced cement, grave, earthling etc. are part and parcel of windmill without which the windmill cannot come into existence and hence the depreciation is allowable on it @ 80% on civil work i.e. foundation, erection and commissioning of a windmill. The Assessing Officer is therefore directed to treat the foundation, erection and commissioning as part and parcel of windmill and allow depreciation on @ 80%. Thus the ground of appeal is allowed."*

*Aggrieved with such order of the Id. CIT(A), the Revenue is in appeal before us.*

*2.2 After hearing both the sides, we do not find any infirmity in the order of the Id. CIT(A) who allowed the claim of the assessee by following the decision of the Tribunal in the case of sister concern of the assessee. The Id. D.R. could not place any material so as to take a contrary view other than the view taken by the Tribunal. We, therefore, do not find any infirmity in the order of the Id. CIT(A) and accordingly uphold the same. The ground raised by the Revenue is accordingly dismissed.*

*3. In the result, Revenue's appeal in ITA No. 6402/Mum/2010 for A.Y. 2004-05 is dismissed.*

*ITA No. 6203 to 6205/Mum/2010 for A.Y. 2005-06 to 2007-08 & 6390/Mum/2010 for A.Y. 2006-07 & 6391 to 6392/Mum/2010 for A.Y. 2007-08 (By Revenue).*

*4. The grounds taken by the Revenue in the above appeals are identical to the ground taken by the Revenue in ITA No. 6402/Mum/2010. We have already decided the issue in favour of the assessee and dismissed the appeal filed by the Revenue. Following the same ratio, the grounds raised by the Revenue in the above appeals are dismissed.*

*5. In the result, all the appeals filed by the Revenue are dismissed."*

Respectfully following the aforesaid decision of the Tribunal in assessee's own case viz. ITA No. 6392/Mum/2010 for AY 2007-08 vide orders dated 21.12.2011(supa) and group companies as enumerated above, we are adjudicated this issue in favour of assessee by holding that the assessee would be entitled for depreciation on civil works(foundation) for wind mills at the same rate of depreciation as is applicable to wind mills and hence the appeal of the Revenue stood dismissed. The Revenue fails in this appeal. We order accordingly.

8. In the result appeal of the Revenue in ITA no. 6824/Mum/2016 for AY 2007-08 stood dismissed .

**ITA no. 6825/Mum/2016(Revenue Appeal)**

9. Our above decision in ITA no. 6824/Mum/2016 for AY 2007-08, shall apply mutatis mutandis to appeal in ITA no. 6825/Mum/2016 for AY 2009-

10 filed by Revenue. Thus, the Revenue fails in this appeal also . We order accordingly.

10. In the result appeal of the Revenue in ITA no. 6825/Mum/2016 for AY 2009-10 stood dismissed .

11.In the result both the appeals of the Revenue in ITA no. 6824-6825/Mum/2016 for AY 2007-08 and 2009-10 stood dismissed .

Order pronounced in the open court on 10.05.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 10.05.2018 को की गई ।

Sd/-

(MAHAVIR SINGH )  
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

Mumbai, dated: 10 .05.2018

*Nishant Verma*  
*Sr. Private Secretary*  
copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR  
ITAT, MUMBAI