

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष BEFORE  
SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 1078/PUN/2016  
निर्धारण वर्ष / Assessment Year : 2010-11

The Deputy Commissioner of Income Tax,  
Circle-5, Pune

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Shri Subhas Hastimal Lodha,  
417-19, Market Yard,  
Pune-411 037.  
PAN : AAQPL3064M

.....प्रत्यर्थी / Respondent

Revenue by : Shri Achal Sharma

Assessee by : Shri Nikhil Pathak

सुनवाई की तारीख / Date of Hearing : 13.06.2018

घोषणा की तारीख / Date of Pronouncement : 20.06.2018

**आदेश / ORDER**

**PER D. KARUNAKARA RAO, AM :**

This appeal filed by Revenue is directed against the order of Commissioner of Income Tax (Appeals), Pune-4 dated 01.02.2016 for assessment year 2010-11.

2. Briefly stated relevant facts include, the assessee is an individual and is engaged in the business of share trading, wind power generation, hotel, software business centre and property trading. Assessee filed the return of income for on 30.09.2010 declaring loss of (-) Rs.4,32,86,445/-. The return was processed u/s. 143(1) of the Act. During the course of assessment proceedings, the AO noticed that the assessee claimed

depreciation on windmill @80%. Considering the same issue of denial of depreciation @80% on the foundation/civil structures relating to windmill in the assessee's own case for A.Y.2009-10, the AO disallowed the claim of depreciation of Rs.54,19,719/- u/s.32(1) of the Act and held that the claim of depreciation @80% as applicable for windmills cannot be applied for civil structures. AO made the addition of Rs.4,32,395/- on account of income from house property. Relevant facts include that assessee was having one property at Amba Complex, Camp, Pune. In the assessment, AO noticed that the assessee declared house property income, however, does not offer any notional income. The AO rejecting the explanation given by the assessee that rent received or receivable from the said property was Nil and calculated the notional income based on the previous record at Rs.58,031/- per month. After allowing 30% standard deduction, the net taxable income from house property is calculated at Rs.4,87,461-. At the end of assessment proceedings, the AO determined the total loss at (-) Rs.3,74,34,330/- as against (-) Rs.4,32,86,445/- made by the assessee

3. Aggrieved with the assessment made by the AO, assessee filed an appeal before the CIT(A). During the First Appellate Proceedings, CIT(A) relying on various decisions/judgments of various courts decided the issue of excess depreciation in favour of the assessee. However, the CIT(A) sustained the addition made by the AO on account of income from house property. Assessee is not in appeal against the said confirmation.

4. Per Contra, aggrieved with the order of CIT(A) giving relief to the assessee on account of excess depreciation claimed by the assessee, the Revenue is in appeal before us on this solitary issue with the following grounds :

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing depreciation @80% on civil work on which depreciation is allowable @10% and since civil works are not specially designed devices, the same are not entitled to higher rate of depreciation?”

2. For this and such other reasons as may be urged at the time of hearing, the order of CIT(A) may be vacated and that of the Assessing Officer be restored.

3. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal during the course of appellate proceedings before the Hon'ble Tribunal.”

5. We heard both the sides on this limited issue of allowing of depreciation @80% for civil structures of the windmill. We also perused the orders of the Revenue authorities and the decisions relied on by both the representatives. We find it relevant to extract the discussion given by the CIT(A) while concluding the issue in favour of the assessee and the same reads as under :

“3.1.2 During the course of appellate proceedings, in respect of Ground No.1 for restricting the allowance of depreciation on wind mill foundation civil work which resulted in addition of Rs.54,19,719, the Ld AR submitted that–

a) Addition on account of disallowance of depreciation on Wind Mill for A.Y. 2009-10 is pending before Hon'ble ITAT is totally wrong. According, to the Ld AR there was no addition on account of disallowance of depreciation on Wind Mill and no appeal was filed before CIT(A) for A.Y. 2009-10 and no appeal is pending before ITAT.

b) AO has not considered the fact that the appellant himself has not claimed depreciation of Rs.12,43,100 being consideration paid for providing easy and free access and keeping the area vacant surrounding land.

c) Ld AR suggested that no expenses were incurred for control room, site development and internal road has claimed by the AO and the depreciation of 10% has been allowed by Hon'ble ITAT, Pune in the case of Poonawala Finvest & Agro Pvt. Ltd. (2008) 118 TTJ 68.

d) Ld AR also submitted that foundation civil work in a integral part of Wind Mill on which depreciation @ 80% is allowable and this has been held in the following cases.

- i) Mayura Steels Pvt. Ltd. Vs. ACIT ITA No1347/PN/2014 by ITAT 'B' Bench, Pune dated 26-10-2015.
- ii) Dr. Santosh Kalmesh Prabhu Vs. ACIT ITA No.1294/PN/2014 by ITAT 'B' Bench, dated 28/10/2015
- iii) ACIT Vs. Suma Shilpa Limited ITAT Pune (2015) 44 CCH 514.

e) Ld AR also submitted that CIT Vs. Sai Udyog Ltd. relied by AO is in no way applicable to the facts of this case.

With the above, Ld AR for the appellant requested that additions of Rs.54,19,719 may kindly be deleted.

3.1.3 At the outset, the observation made by the AO that similar disallowances made for the AY 2009-10 is pending before the Hon'ble ITAT is factually incorrect. Adverting to the merit of the case, the quantum which remains is whether civil work and foundation necessary for installation of wind mill should be considered as integral part or not. If yes, then, depreciation as applicable to wind mill should be accorded to the civil structure and foundation needed to set up wind mill or not. In my considered view it is a well settled legal position that expenses incurred on foundation should be considered as an integral part of the plant and machinery. This fact has been reiterated by the Hon'ble Supreme Court in the case of Challapalli Sugars Ltd. Vs. CIT (Supra) wherein it has been decided that "fixed assets should include all the expenditure necessary to bring such assets into existence and put them in working condition. During the course of the appellate proceedings Ld AR while referring the ratio of decision of CIT Vs. K. K. Enterprise (2014) reported at 108 DTR 0109 (Raj), Hon'ble Rajasthan High Court has observed that the civil work and foundation is necessary for strong foundation and no windmill could be installed without having a strong foundation. As such depreciation on investment for civil work and foundation at the rate which the depreciation is allowed to windmill is applicable for these items too. The electrical items, components and common power evacuation too are integral part of a wind mill as that could have not been operational without these items". The revenue challenged the decisions of the CIT(A) before the ITAT, Jodhpur be dismissed wherein the Hon'ble ITAT affirmed the findings given by the CIT(A) by holding as under:-

"Without doing the civil construction work including foundation work, it was not possible to install the windmill. Similarly, the electric items, components and installation were necessary for the wind mill, because in the absence of these components and electric items it was not possible for the windmill to produce electricity. Therefore, it was also the integral part of the windmill."

In this regard Hon'ble ITAT has also held that foundation of civil work is an integral part of windmill on which depreciation @ 80% is to be allowed. The above positions have been decided by Hon'ble ITAT, Pune in the case of Mayura Steels Pvt. Ltd. Vs. ACIT (Supra), in the case of Santosh Kalmesh Prabhu Vs. ACIT (Supra) and in the case of ACIT Vs. Suma Shilipa Limited (Supra). In the case of Mayura Steels Pvt. Ltd. Vs. ACIT (Supra), Hon'ble ITAT has followed the ratio of Hon'ble Gujarat High Court in the case of CIT, Ahmedabad-III Vs. Parry Engineering & Electronics (P) Ltd (Supra). The same is reproduced below for ready reference:-

"5. We are of the opinion that the approach of both the authorities is perfectly justified. Windmill would require a scientifically designed machinery in order to harness the wind energy to the maximum potential. Such device has to be fitted and mounted on a civil construction, equipped with electric fittings in order to transmit the electricity so generated. Such civil structure and electric fittings, therefore, it can be well imagined, would be highly specialized. Thus, such civil construction and electric fitting would have no use other than for the purpose of functioning of the windmill. On the other

hand, it can be easily imagined that windmill cannot function without appropriate installation and electrification. In other words, the installation of windmill and the civil structure and the electric fittings are so closely interconnected and linked as to form the common plant. As already noted, the **legislature has provided for higher rate of depreciation of 80% on renewable energy devises including windmill and any specially designed devises, which runs on windmill. The civil structure and the electric fitting, equipments are part and parcel of the windmill and cannot be separated from the same.** The assessee's claim for higher depreciation on such investment was, therefore, rightly allowed."

3.1.4 Hon'ble Bombay High Court in the case of CIT-III, Pune Vs. Cooper Foundry Pvt. Ltd.(Supra) has also held that cement foundation is to be included in the cost of the windmill while granting depreciation @ 80%. Similar issue has been taken by Pune Bench "B" in the case of ACIT Vs. Western Precicast Pvt. Ltd. (Supra) and by Chennai Tribunal in the case of Kutti Spinners (P) Ltd. In view of the foregoing discussion and respectfully following the decisions of Bombay High Court in the case of CIT Vs. Great Eastern Shipping Co. Ltd. reported at 118 ITR 772 (Born) and Challapalli Sugars Ltd. Vs. CIT 98 ITR 167 (SC) and decision of Pune ITAT in the case of Mayura Steels Pvt. Ltd. Vs. ACIT (Supra), in the case of Dr. Santosh Kalmesh Prabhu Vs. ACIT (Supra) and in the case of ACIT Vs. Suma Shilpa Limited (Supra), I am of the considered view that **higher depreciation is applicable in wind mill and also expenses incurred on civil structures are applicable in wind mill** and therefore the amount of Rs.54,19,719 disallowed by the AO on account of Hence, the AO is directed to delete the amount of Rs.54,19,719/- on account of excess depreciation. With this ground No.1 stands adjudicated in favour of the appellant.

5.1 Further, we find the Pune Bench of the Tribunal in the case of ACIT Vs. Suma Shilpa Limited 44 CCH 0514 (Pune-Trib.) has held as under :

**Conclusion :**

*Civil construction and electrical work are specifically designed for operation of windmills and are not separable, therefore, depreciation on these structures/fittings have to be applied at same rate, as is available to principle asset.*

Considering the binding precedents on this limited issue of allowing higher depreciation on the civil works linked to the foundation work of the windmill, we are of the opinion that the assessee is entitled to claim higher depreciation @80% on the civil structures of the windmill which is part and parcel of the windmill and which cannot be separated.

Therefore, the order of CIT(A) holding that the higher depreciation is applicable in windmill and also expenses incurred on civil structure, is fair and reasonable and it does not call for any interference. Accordingly, the ground raised by the Revenue is dismissed.

6. In the result, the appeal of the Revenue is dismissed.

Order pronounced on this 20<sup>th</sup> day of June, 2018.

Sd/-

Sd/-

(विकास अवस्थी /VIKAS AWASTHY) (डी. करुणाकरा राव/D. KARUNAKARA RAO)  
न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 20<sup>th</sup> June, 2018.  
Satisb

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-4, Pune.
4. The Pr. CIT-3, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

//True Copy //

Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune