

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA Nos. 177, 178 & 179/Srt /2023
(Assessment Year: 2008-09 to 2010-11)
(Physical hearing)

Aaradhna Developers Pvt. Ltd., 33, Ascon City, 2 nd Floor, City Light Road, City Light, Surat. PAN No. AABCA 9752 H	Vs.	I.T.O., Ward-1(1)(1), Surat.
Appellant/ Assessee		Respondent/ Revenue

Assessee represented by	Shri Rajesh C Shah, CA
Revenue represented by	Shri Vinod Kumar, Sr. DR
Date of Institution of Appeal	10/03/2023
Date of hearing	23/08/2023
Date of pronouncement	30/10/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. These three appeals by the assessee are directed against the separate orders of National Faceless Appeal Centre, Delhi (in Short NFAC)/learned Commissioner of Income Tax (in short, the Id. CIT(A) dated 03/02/2023 and 06/02/2023 for the Assessment Year (AY) 2008-09 to 2010-11 respectively. In all these appeals, the assessee has raised similar grounds of appeal, except certain variation on account of addition. Certain facts in all these years are common, therefore, with the consent of parties all these appeals were clubbed, heard together and are being decided by this consolidated order to avoid the conflicting decision. For appreciation of facts, with the consent of parties, the

appeal for the A.Y. 2008-09 in ITA No. 177/Srt/2023 is treated as a "lead case". In this appeal, the assessee has raised following grounds of appeal:

1. *The learned Income Tax Officer was not justified in reopening of the case u/s 147 of the Act and the Id. CIT(A) has erred in confirming the same.*
2. *The learned Income Tax Officer has erred in issue of notice u/s 148 of the Act and the Id. CIT(A) has erred in confirming the same.*
3. *The learned Income Tax Officer was not justified in making addition of Rs. 6,03,420/- on account of unexplained investment under construction of work.*
4. *The learned Income Tax Officer was not justifying in making addition of Rs. 19,76,952/- on account of minimum profit accumulated from the project.*
5. *The learned Income Tax Officer was not justified in making addition of Rs. 92,33,526/- on account of construction work done by the assessee treated as taxable business receipts and the Id. CIT(A) has erred in confirming the same.*
6. *The appellant reserves the right to add, alter, amend or withdrawn any grounds of appeal."*

2. Rival submissions of the both the parties were heard and record perused. The learned Authorised Representative (Id. AR) of the assessee submits that reopening under section 147 in the present case is not valid, there was no escapement of income at all, thus, the assessment order passed in pursuance thereof is *void ad initio* and is liable to be declared as such. The Id AR for the assessee submits that he has very strong case on the validity of reopening. The reopening was based on wrong assumption of facts. While explaining such facts, the Id AR for the assessee submits that there were eight separate group companies including of assessee, each company owned some portion of land. The

financial position of all seven companies and of assessee company, were not good, the land was purchased by them from loan obtained from the directors and shareholders. Due to financial constrain those companies were unable to undertake any construction project independently. Therefore, all the eight group companies entered in agreement with one partnership firm M/s Global Enterprises on 04.01.2006, wherein directors and shareholder of the company are also partners. As per the agreement all the funds and infrastructure facility will be provided by the firm Global Enterprises and in turn all the eight companies had to transfer its proportionate share to the firm at cost, so in turn the companies will not get any loss and at the same time will not earn any profit. On the basis of said agreement, funds were managed from various banks as well as from intending flats buyers. All the finance received from the flat purchaser and bankers were paid or disbursed to the firm Global Enterprises. All the sale deeds were executed in favour of purchaser by eight companies and the firm Global Enterprises. The existence of agreement of eight group companies with firm Global Enterprises is not in dispute.

3. The Id AR for the assessee submits that as per the said agreement dated 04.01.2006, the said firm Global Enterprises had commenced the construction activities in the financial year (FY) 2005-06 i.e. assessment years (AY) 2006-07 and completed in the FY 2009-10 i.e. AY 2010-11.

As the project in FY 2005-06 and 2006-07 were in early stage and accordingly no profit was offered to tax by the firm Global Enterprises. The Id AR for the assessee submits that in between period a survey was carried out by investigation team and later on search under section 132 was conducted on firm- Global Enterprises in February 2008. In the search action the said firm has offered the additional income/profit of Rs.6,23,00,000/- (Rs. 623. 00 Lakhs). The additional income offered in course of search proceedings, was other than the normal profit of the firm. The Id AR for the assessee has shown that said firm has offered following income for three years in the following manner:

Asst. Year	Income offered by assessee		Total	Tax paid by Global Enterprises
	Normal	Disclosure		
2008-09	1,70,25,818	6,23,00,000	7,93,25,818	2,81,23,237
2009-10	85,09,339	-	85,09,339	27,33,690
2010-11	35,33,192	-	35,33,192	11,11,180
Total	2,90,68,349	6,23,00,000	9,13,68,349	3,19,68,107

4. Pursuant to search and survey action the assessment of Global Enterprises for three assessment years (AY 2008-09 & 2009-10) were completed under section 143(3) of the Act and the assessment for were completed by DCIT, Central Circle-1, Surat on 31.12.2009 and 29.12.2011 respectively. And assessment for AY 2010-11 was completed by ACIT, Circle 3, Surat on 28.02.2013. The copy of assessment order for AY 2008-09 of Global Enterprises is filed. There was certain other addition made by Central Circle-1, Surat and in further appeal the

addition were deleted by Ld. CIT(A) and the order of CIT(A) was upheld, by the Hon'ble Tribunal Ahmedabad.

5. The Id AR for the assessee submits that out of eight companies, the return of one of such group company namely Akanksha Organisers Pvt. Ltd. was selected under scrutiny and the assessment under section 143(3) of the Act was made on 27.12.2011 by the income-tax officer, ward 1(1), Surat. The income offered by that assessee company for Rs. 8,750/- was accepted in scrutiny assessment under section 143(3) of the Act. Further, the assessments of all the eight companies including the present assessee were selected under scrutiny for AY 2010-11 and the scrutiny assessment completed under section 143(3) of the Act was completed on 07.03.2013 by ITO, Ward 1(1), Surat in accepting returned income.
6. The Id AR for the assessee fairly submits that the order passed under section 143(3) of the Act, in Akanksha Organisers Pvt. Ltd., was revised by Ld. CIT-1, Surat by exercising jurisdiction order under section 263 of the Act, and on further appeal it was upheld by Tribunal Ahmedabad and further appeal by assessee before Hon'ble Gujarat High Court has been admitted and the same is still pending for adjudication.
7. The case of the assessee for all the three years has been re-opened under section 147 of the Act for the by taking view the following income for three assessment years escaped from assessment:

"Asst. Year 2008-09: 11.64 % of Rs.7,93,25,824/- i.e. Rs.92,33,526/- less interest cost if any.
Asst. Year 2009-10: 11.64 % of Rs.86,73,070/- i.e. Rs.10,09,545/- less interest cost if any.
Asst. Year 2010-11: Rs.4,15,427/-."

8. The Id AR for the assessee submits that all the above allegedly escaped income recorded in reason, are the same income which has already been offered by the firm Global Enterprises in its return of income and assessed in hands of said firm under scrutiny assessment under section 143(3) of the Act by the department. Notices under section 148 of the Act were issued for all the three years i.e. for AY 2009-10 on 31.03.2014, and for AY 2008-09 on 19.06.2014 and for AY 2010-11 on 24.04.2014. The assessee company has filed objection against re-opening of the case. The assessing officer rejected the objection and made re-assessment in all three years despite the facts that no income has escaped from assessment. The Id AR for the assessee retreated that in fact no income has escaped from the assessment, the income has already been offered and accepted in the hand of Global Enterprises, which is related party. To support his submissions, the Id AR for the assessee relied on the decision of Hon'ble Apex Court in CIT Vs Glaxo Smithkline Asis (P) Limited (2010) 236 ITR 113(SC)/ 195 Taxman 35 SC and in Ashish Plastic Industries Vs ACIT in Civil Appeal No. 1509 of 2004. The Id AR for the assessee submits that even on merit of the addition the assessee has good case as neither the income is escaped nor the assessee concealed any income, entire income has been offered

in the hand of Global Enterprises which is taxed at maximum marginal rate. Even of the proportionate income as per their contributions, it would have been revenue neutral. The assessing officer made additions in all years on the basis of imaginary calculation, which is quite difficult to understand. The assessing officer tried to calculate profit on the basis of registration deeds of flats in particular year, which is not possible as the assessee is following mercantile system of accounting. The Id AR for the assessee, thus on the basis of his submissions prayed for allowing all the appeal of the assessee on legal issues as well as on merit.

9. On the other hand, the Id. Senior departmental representative (Sr DR) for the revenue supported the order of lower authorities. The Id Sr DR for the revenue also filed written synopsis of his submission, which is placed on record. The Id Sr DR for the revenue in his written as well as in oral submissions submits that search action 132 in assessee's group was carried out. The assessee group declared additional income of Rs. 6.23 Crore, besides regular income of Rs. 1.70 Crore in case of Global Enterprises for AY 2008-09. The assessment of Global Enterprises was completed under section 143(3). Later on, on the basis of information and analysing such information, the assessing officer has formed his belief for recording reason that income of the assessee has escaped from assessment, under section 147. In this group eight group companies gathered and entered in to agreement on 04.01.2006 with

Global Enterprises a partnership firm, wherein the directors of all the eight companies are partners. On the basis of agreement, it can be seen that there was equivalence among the corporate entity and partners of Global Enterprises and only funds were brought in Global Enterprises. The profits were to be assessed in the hands of the owners of the project that is corporate entities, which returned nil income. All income of the project including regular income deducted as a result of search and seizure and has been offered in the hands of Global Enterprises at Rs. 7.93 Crore. The profit from the development of the project is to be fixed in the hands of the person in whose hands it arises. The income of the assessee would be in the ratio of its ownership of the project which is 11.64%. Accordingly, the income escaped in the hand of assessee would be 11.64% of Rs. 7.93 Crore, less interest income incurred, if any on the funds provided by Global Enterprises. The various pleas raised by the Id AR for the assessee are not correct, as at the stage of reopening the assessing officer is not required to hold conclusively that additions invariably be made. To support his submissions, the Id SR DR for the revenue relied on the decision of Hon'ble Gujarat High Court in Keshav Diamonds Private Limited Vs ITO in Special Civil Application No. 21124 of 2019, Yogendra Kumar Gupta Vs ITO (2014) 46 taxmann.com 56(Guj)/ 366 ITR 186, Aradhana Estate (P) Limited Vs DCIT (2018) 91 taxmann.com 119 (Guj), Jayant Security Vs ACIT (2018) 91

taxmann.com 181 Guj, PCIT Vs Gokul Ceramics (2016) 71 taxmann.com 341 (Guj), Hon'ble Supreme Court in ITO Vs Purushottam Dass Banger (1997) 90 Taxman 541 SC/ 227 ITR 362 SC, ITO Selected Dalurband Coal Co (P) Ltd (1996) 217 ITR 597 and Madras High Court in Sterlite Industries (India) Ltd Vs ACIT (2009) 177 Taxman 311/ 302 ITR 275-Madras.

10. We have considered the submissions of both the parties and have gone through the orders of the lower authorities carefully. We have also gone through all the case laws relied by the le representatives of the parties. There is no dispute that eight group entity agreed to contribute their land for development with Global Enterprises, which is also group concern, being partnership firm of the directors and the shareholders of those group entities. The share of land contribution in Global Enterprises by all eight company was in the following manners;

Sr No.	Name of the entity of group (Akansha Group)	PAN	Share in land
1	Aakansha Organisers Pvt Ltd	AABCA 9583 E	11.64%
2	Ankush Construction Pvt Ltd	AABCA 9585 C	11.64%
3	Anamika Construction Pvt Ltd	AABCA 9949 E	11.64%
4	Adhunik Construction Pvt Ltd	AABCA 9759 N	15.11%
5	Ankit Builders Pvt Ltd	AABCA 9587 A	16.01%
6	Ajnabi Developers Pvt Ltd	AABCA 9578 P	11.64%
7	Abhilasha Constrcution Pvt Ltd	AABCA 9579 N	10.68%
8	Aaradhana Developers Pvt Ltd	AABCA 9752H	11.64%

11. The assessing officer while recording the reasons of reopening recorded that all the entity who were holding land obtained permission of development of residential project jointly and thereafter, all eight entity entered into agreement with Global Enterprises. All eight entity transferred their land to Global Enterprises at cost. All the profit was shown in hand of Global Enterprises for AY 2008-09 of Rs. 7.93 Crore. The assessing officer by recording that there was equivalence between the members of corporate entity and partners of the Global Enterprises and only funds was to be brought in by Global Enterprises. The profit was to be assessed from project in the hand of the persons in whose hand it arises. The income of the assessee would be in the ratio of its ownership of the project i.e. 11.64%. Accordingly, the income escaping in the hand of assessee would be 11.64% of Rs. 7.93 Crore, less interest income incurred, if any, on the funds provided, if any by Global Enterprises. The assessing officer quantify the income escaping of Rs, 92,33,526/- being 11.64% of Rs. 7.93 Crore.
12. We find that against the reasons recorded the assessee filed very detailed objections, interalia stating therein that (i) there is no income escaped in the hands of assessee company as all the escaped income shown in reason recoded were already assessed in the hands of sister concern M/s Global Enterprises. (ii) The alleged agreement dated 04.01.2006 was accepted by the outside agencies/authorities such as

sub-registrar and various banks including public sector bank. (iii) The transfer of properties on cost by eight companies to M/s Global Enterprises were not prohibited in any law including Income-tax Act. (iv) The cost on which properties were transferred by eight companies to the M/s Global Enterprises were at Rs. 774.41 per Sq. Ft. The Jantri rate was also not more than Rs.455/- per Sq. Ft. And the assessee company has submitted the evidence in support in form sale deed at Rs.455/- per Sq. Ft. was accepted by the sub-registrar. The-assessee company-has raised the issue that when the properties were transferred at cost so there is no actual profit in the hands of assessee company, then under which section of Income-tax Act income escaped in the hands the income is escaped in hands of assessee company. (v) The assessee also stated that Section 43CA or 50C were even applied even in that case the property is transferred at more than jantri value. In other words, in the reason recorded it is not mentioned under which section income is escaped in the hands of assessee company. (vi) The wording of reason recorded are borrowed from the order under section 263 of the Act passed by Ld. CIT-1, Surat in the case of Akanksha Organisers Pvt. Ltd in AY 2009-10 and (vii) 'When the view of the assessee were accepted in scrutiny assessment proceedings u/s 143(3) of the Act, then on same issue the re-opening is change of opinion that too on without any subsequent material come to the notice of assessing officer.

13. The objections of the assessee was rejected by assessing officer vide order dated 10.02.2015. The assessing officer completed assessment on 30.06.2016 and made addition of Rs. 92,33,526/- being % profit on the share. Addition of Rs. 19,76,952/- being minimum profit accumulated from project and of Rs. 6,03,420/- on account of unexplained investment. Being aggrieved the assessee filed appeal before Id CIT(A), and challenged the validity of reopening as well as additions. The Id CIT(A) upheld the reopening as well as all the additions.
14. We find that Pursuant to search and survey action the assessment of Global Enterprises for three assessment years (AY 2008-09 were completed under section 143(3) of the Act and the assessment for 2008-09 & 2009-10 were completed by DCIT, Central Circle-1, Surat on 31.12.2009 and 29.12.2011 respectively. And assessment for AY 2010-11 was completed by ACIT, Circle 3, Surat on 28.02.2013. The assessing officer in AY 2008-09 made certain other additions, which were deleted by Ld. CIT(A) and the order of CIT(A) was upheld, by the Ahmedabad Tribunal. We find that there is no material on record placed either by assessee or by revenue that cases of other six group entity/ companies were reopened or not under section 147 or revised under section 263. In such circumstances, we assume that no such reassessment action was initiated in remaining six group entity. Only,

the case of present assessee was reopened for three assessment years.

Thus, the assessment of all six group entity have attained finality.

15. Before us, the Id AR for the assessee vehemently submitted that there is no escapement of income and that the escaped income mentioned in reason recorded was income assessed in the hands of M/s Global Enterprises. We find that Global enterprises in the search action made disclosure of Rs.6,23,00,000/-, which has been accepted and taxed in the hand of Global Enterprises. Besides the discloser, Global Enterprises also declared Rs. 2.90 Crore as regular income for all three assessment years that is for AY 2008-09, 2009-10 & 2010-11. For this assessment years (AY 2008-09), Global Enterprises declared income of Rs. 1.70 Crore plus Rs, 6.23 Crore as discloser, thereby offered Rs. 7.93 Crore. We find that in the reasons recorded itself the assessing officer recorded that 11.64% of profit Rs. 7.93 Crore has escaped from assessment in the hand of present assessee. Such profit has already offered by Global Enterprises and has been accepted by the revenue. We are unable to subscribe that that fact that once, the profit of Rs. 7.93 Crore, which is declared by Global Enterprises and accepted by revenue, as to how its 11.64% being share of assessee can be again brought to tax. The assessing officer and the Id CIT(A) failed to appreciate the settled position under taxing statue that double taxation of similar revenue (income) is not permissible.

16. We find that Hon'ble Supreme Court in Ashish Plastic Industries Vs ACIT in Civil Appeal No. 1509 of 2004 while considering the plea of assessee that sales which is found in their books of account, on which tax has been paid by M/s Ashish Agro Plastic Limited (sister concern), the Hon'ble Court held that if the appellant is able to prove that tax on the income generated from the sale of the material has been paid by Ashish Agro Plastic Limited, benefit thereof should be extended to the assessee. Thus, on the basis of afforesaid factual and legal position, we are of the considered view that there was no income which escaped from assessment, the receipt of income as indicated from the reasons recorded itself was taxed by the revenue in the hands of Global Enterprises. Hence, the reasons recorded itself was not sufficient and rather incorrect assumption of facts, based on which the action of reopening was initiated. Accordingly, reopening is not valid and justified and the action initiated thereupon is *void ad initio*. The issuance of notice under section 148 was based wrong assumption of fact. Therefore, the assessment order passed under section 143(3) rws 147 dated 30.03.2016 is quashed.

17. The objection of the Id Sr DR for the revenue as raised in his submission, is also no tenable. The ratio of the case laws relied by Id Sr DR are not applicable on the facts of present appeal. The facts of the present case are quite clear, the assessing officer were bringing the

same income which stand offered by the Group assessee and were accepted and taxed. The facts in Keshav Diamonds Pvt Ltd (supra) and in ITO Vs Purushottam Banger (supra) relied by Id Sr DR for the revenue are not similar to the facts of present assessee. In both the case the reopening was based on the information of investigation wing about alleged indulging of those assessee in manipulating transaction which required verification and investigation of facts and the reasons recorded in those cases at that stage was not insufficient. However, in the present case, the case of assessing officer wants to bring to tax 11.64% of Rs. 7.93 Crore, income offered and taxed in the hand of Global Enterprises as share of assessee, which has already been taxed. Similarly, the facts of case laws in Yogendra Kumar Gupta Vs ITO (supra) and in Aaradhana Estate (P) Ltd (supra) are also at variance, in the said cases the reopening was based on the allegation of accommodation entry, which require through enquiry. Similarly, other case laws relied by the Id Sr DR is also based on such information, wherein sufficiency of the reasons could not be said to be insufficient. However, the basis of reopening in the case in hand clearly demonstrate that the income which was sought to be brought to tax, has already been taxed and accepted by the revenue. Thus, the assessee succeeded on the primary submissions of Id AR for the assessee on the validity of

reopening. In the result, the ground No. 1 & 2 of the appeal are allowed.

18. Considering the facts, that we have allowed ground No. 1 & 2 of the appeal, and quashed the assessment order, therefore, adjudication on the merits of the additions have become academic.

19. In the result, the appeal filed by the assessee is allowed.

ITA No. 178 & 179/Srt/2023 for AY 2009-10 and 2010-11.

20. Considering the facts that the facts that the assessee has raised similar grounds of appeal as raised in ITA No. 177/Srt/2023, which we have allowed on legal issues, therefore, following the principles of consistency the appeals for these two years are also allowed with similar directions.

21. In the result, these appeals are also allowed.

Order pronounced in the open court on 30th October 2023.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER
Surat, Dated: 30/10/2023

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

**Ranjan*

Copy to:

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2. Revenue
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4. DR
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By order

Sr. Private Secretary, ITAT, Surat