IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENT, AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1188/Mum./2023	**ITA no.1189/Mum./2023**
(Assessment Year : 2011–12)	(Assessment Year : 2016–17)

Maccaferri Environmental Solutions Pvt. Ltd.
1004, The Affaires, Plot no.9
Palm Beach Road, Sector–17, Sanpada
Mumbai 400 705 PAN AABMCM5896L ..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle–3(2)(1), Mumbai .....Respondent

Assessee by : Shri Aakash Uppal
Revenue by : Smt. Mahita Nair

Date of Hearing – 13/07/2023	Date of Order – 17/08/2023

O R D E R

The present appeals have been filed by the assessee challenging the separate impugned orders of even date 14/02/2023, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*], for the assessment years 2011–12 and 2016–17.

ITA No.1188/Mum./2023
Assessee's Appeal – A.Y. 2011–12

2. In its appeal, the assessee has raised the following grounds:–

"1. On the facts and circumstances of the case, and in law, the Assessment Order passed by the Learned Assessing Officer (Ld. AO') and NFAC is bad in law.

2. That the Ld. AO and NFAC grossly erred on facts and in law in making addition of INR 300,73,421 purely basis the income appearing in Form 26AS for the Financial Year 2010-11.

3. That the Ld. AO and NFAC grossly erred on facts in not appreciating that such income was considered by Sargon Geosynthetics Limited (a Company amalgamated with Appellant w.e.f. December 19, 2008) from Sunway Construction SDN BHD during financial years 2006-07, 2007-08 and 2008-09 respectively.

4. That the Ld. AO and NFAC has grossly erred in facts and in law by framing the addition of income appearing in Form 26AS solely on the basis of non-responsiveness of notices issued under section 133(6) of the Income-tax Act, 1961 ("Act) to Sunway Construction SDN BHD, without examining and appreciating the evidence furnished by the Appellant in the course of proceedings before them.

5. That the Ld. AO/NFAC grossly erred in law in making addition of income of INR 300,73,421 under section 115JB of the Act without appreciating that the same is against the principles laid down by Hon'ble Supreme Court in the case of Apollo Typres Ltd. vs CIT (255 ITR 273).

6. That the Ld. AO/NFAC has grossly failed to appreciate in accordance with law, that they have limited powers of making adjustment (increase or reductions) as provided for in explanation to section 115JB of the Act.

The Appellant prays that the above grounds of appeal are without prejudice to each other.

That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

3. The brief facts of the case as emanating from the record are that the assessee is engaged in the manufacture of a range of products for the conservation and preservation of the earth, water banks, etc. For the year under consideration, the assessee originally filed its return of income on 29/11/2011 declaring a total income of Rs. nil under normal provisions of the Act after set off of brought forward losses, and tax was paid on book profit of Rs. 1,41,63,331 determined under section 115JB of the Act. The return filed by the assessee was selected for scrutiny and vide order dated 27/03/2015 passed under section 143(3) read with section 92CA the total income of the assessee was assessed at Rs. 12,98,000 and tax payable was determined on

book profit of Rs.1,41,63,331 computed under section 115JB of the Act. Thereafter, the assessment was reopened under section 147 of the Act and vide order dated 29/12/2016 passed under section 143(3) read with section 147 of the Act the total income of the assessee was assessed at Rs. 12,98,000 and tax payable was determined on book profit of Rs. 9,00,84,965 computed under section 115JB of the Act.

4. Subsequently, on the basis of the information received from DCIT, Circle-22(1), New Delhi of NMS Cycle-2 data that M/s Sargon Geosynthetics Ltd now known as M/s Maccaferri Environmental Solutions Pvt. Ltd. has not filed any return of income for the assessment year 2011-12, whereas it received taxable income during the financial year 2010-11, reassessment proceedings under section 147 of the Act were initiated and notice under section 148 was issued to the assessee on 28/03/2018. In response to the aforesaid notice, the assessee filed its return of income on 02/11/2018 declaring the total income of Rs. Nil under normal provisions of the Act after set off of brought forward losses, and tax was paid on book profit of Rs. 1,41,63,331 determined under section 115JB of the Act. During the reassessment proceedings, the assessee was asked to show cause as to why the amount received in the name of M/s Sargon Geosynthetics Ltd, as per the information received, be not added to the total income of the assessee for the year under consideration. In response thereto, the assessee submitted that the receipts from M/s Sunway Construction are pertaining to the job carried out in the financial years 2006-07, 2007-08, and 2008-09. Further, the aggregate work carried out and accounted in the books and reflected in the financial statements of M/s Sargon Geosynthetics Ltd is Rs. 3,74,56,144,

which exceeds the amount as reflected in AIR and thus the amount of Rs. 2,99,89,133 and Rs. 84,288 already stands accounted in the books of M/s Sargon Geosynthetics Ltd. It was further submitted that no job has been carried out for Sunway Construction by the assessee. During the assessment proceedings, notice under section 133(6) of the Act was issued to Sunway Construction seeking information regarding the transaction with M/s Sargon Geosynthetics Ltd during the financial year 2010-11. However, in response thereto, no compliance was made by Sunway Construction, and no details were filed. The Assessing Officer ("*AO*") vide order dated 25/12/2018 passed under section 143(3) read with section 147 of the Act did not agree with the submissions of the assessee and held that the assessee is unable to furnish evidence to establish that no transaction was entered into with Sunway Construction during the financial year 2010-11. The AO further held that the assessee has not filed any documentary evidence in support of its claim. Accordingly, the AO added the amount of Rs. 3,00,73,421, being the receipts from Sunway Construction as appearing in Form 26AS for the financial year 2010-11 of M/s Sargon Geosynthetics Ltd., to the total income of the assessee computed under normal provisions and also to the book profit under section 115JB of the Act.

5. The learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee and upheld the addition made by the AO. Being aggrieved, the assessee is in appeal before us.

6. We have considered the submissions of both sides and perused the material available on record. It is evident from the record that the AO made

the addition of an amount of Rs. 3,00,73,421 on the basis of the information received from DCIT, Circle-22(1), New Delhi that M/s Sargon Geosynthetics Ltd. (now merged with the assessee) received the aforesaid amount from Sunway Construction during the financial year 2010-11 and the said amount is not offered to tax despite the fact that the said amount is appearing in Form 26AS of M/s Sargon Geosynthetics Ltd for the financial year 2010-11. However, as per the assessee, the aforesaid sum pertains to the work carried out for Sunway Construction in the financial years 2006-07, 2007-08, and 2008-09. In this regard, the assessee also placed on record the copy of the ledger of Sunway Constructions in the books of M/s Sargon Geosynthetics Ltd. for the financial years 2006-07, 2007-08, and 2008-09. It is also the plea of the assessee that aggregate receipts from Sunway Constructions for the three years is Rs. 3,74,56,144, which is much more than the amount alleged to have been received by M/s Sargon Geosynthetics Ltd. as per AIR information. In order to substantiate its claim that the impugned sum of Rs. 3,00,73,421 was not received by the assessee from Sunway Constructions during the year, the assessee has also placed on record the copy of its Form 26AS which forms part of the paper book from pages 38-47. In the present case, it is undisputed that M/s Sargon Geosynthetics Ltd. merged with the assessee with effect from 19/12/2008. Thus, it cannot be disputed that after 19/12/2008 M/s Sargon Geosynthetics Ltd. was a non-existing entity. Therefore, any sum received from any entity during the assessment year 2011-12 can only be in the name of the assessee and not in the name of the erstwhile entity. However, we find that the lower authorities have not examined the aforesaid aspect and merely on the basis of AIR information regarding details in Form 26AS of M/s Sargon

Geosynthetics Ltd. made the impugned addition. Therefore, we deem it appropriate to restore the matter to the file of the AO for *de novo* adjudication after necessary examination of all the details furnished by the assessee including the details in Form 26AS of the assessee for the year under consideration. The assessee may also make necessary endeavour to obtain the information from Sunway Construction regarding its transaction with M/s Sargon Geosynthetics Ltd. and the period for which the impugned payment was made to M/s Sargon Geosynthetics Ltd. Since we have restored the matter to the file of the AO, the issue raised in grounds no.5 and 6 pertaining to the computation of book profit under section 115JB of the Act is also restored to the file of AO for *de novo* adjudication. Accordingly, the impugned order is set aside and the grounds raised by the assessee are allowed for statistical purposes.

7. In the result, the appeal by the assessee is allowed for statistical purposes.

ITA No.1189/Mum./2023
Assessee's Appeal – A.Y. 2016–17

8. In its appeal, the assessee has raised the following grounds:–

"1. On the facts and circumstances of the case, and in law, the Assessment Order passed by the Learned Assessing Officer ('Ld. AO') and NFAC is bad in law.

2. That the Ld. AO and NFAC grossly erred on facts and in law in making disallowance of payment of gratuity of INR 93,16,597 on the basis that the same is not appearing in Tax Audit Report.

3. That the Ld. AO and NFAC grossly erred on facts in not appreciating that Appellant had arrangement with LIC for such gratuity payments are maintained & managed through Life Insurance Corporation of India (LIC).

4. That the Ld. AO and NFAC grossly erred on law that the payment of Gratuity

maintained by LIC can be claimed as a deduction while computing the total income and would not be hit by the provision of sections 40A(7) and 40A(9) of the Act.

5. That the Ld. AO and NFAC failed to consider the documentary evidence submitted by the Company for the payment of gratuity made on different dates during the financial year 2015-16 and proceeded to disallow the same solely on the basis that such payment was not disclosed in Tax Audit Report.

6. That the Ld. AO and NFAC grossly erred in law in not appreciating that an opinion issued by a Tax Auditor as part of their Tax Audit Report is an independent opinion and the Appellant is entitled to take a tax position which may be different from reporting made in Tax Audit Report.

The Appellant prays that the above grounds of appeal are without prejudice to each other.

That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

9. The brief facts of the case are that for the year under consideration, the assessee filed its return of income on 26/11/2016 declaring a total income of Rs. 2,94,67,664 as per normal provisions of the Act and Rs.5,52,46,172 as book profit under section 115JB of the Act. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, upon perusal of the computation of income, it was, inter-alia, observed that the assessee has claimed a deduction of Rs. 93,16,597 on account of gratuity paid. However, in the Tax Audit Report in Form 3CD no such amount was mentioned by the tax auditor in clause26(i)(A)(a) which relates to any sum referred to in clauses (a), (b), (c), (d), (e) or (f) of section 43B of the Act. Accordingly, the assessee was asked to show to furnish details of the gratuity paid of Rs.93,16,597 along with substantive documentary evidence and to explain why this payment was not quantified in the Tax Audit Report. The assessee was asked to show cause as

to why the deduction claimed on account of gratuity paid be not disallowed and added back to the income for the year under consideration. In response thereto, the assessee submitted the details of the gratuity payment of Rs. 93,16,597. The AO vide order dated 22/12/2018 passed under section 143(3) of the Act did not agree with the reply filed by the assessee in the absence of documentary evidence in respect of payments made and the explanation regarding no remark in the tax audit report. Accordingly, the AO disallowed the deduction of Rs.93,16,597 on account of payment of gratuity and added the same to the total income of the assessee for the year under consideration.

10. In the appeal before the learned CIT(A), despite notices being issued, no reply/submission was filed on behalf of the assessee. Accordingly, vide impugned ex−parte order dated 14/02/2023, the learned CIT(A) dismissed the appeal filed by the assessee. Being aggrieved, the assessee is in appeal before us.

11. We have considered the rival submissions and perused the material available on record. It is evident that the learned CIT(A) has passed the order ex-parte due to the non-appearance of/on behalf of the assessee. Now in appeal before us, the assessee is duly represented by the learned Authorised Representative ("*learned AR*") and wishes to pursue the litigation against the addition made by the AO. The assessee has also filed the paper book enclosing the proof of payment of gratuity. We find that the assessee also filed a rectification application dated 16/03/2090 before the AO enclosing the payment receipt of the premium paid. However, it is evident from the record that all these details were neither furnished during the assessment

proceedings nor furnished before the learned CIT(A). Therefore, in view of the above, we deem it appropriate to restore the issue of allowability of payment of gratuity to the file of the AO for *de novo* adjudication after consideration of all the details/submissions as filed by the assessee. Needless to mention that no order shall be passed without affording reasonable opportunity of hearing to the assessee. Further, the assessee is directed to provide all the information/details as may be required by the AO for complete adjudication of this issue. Accordingly, the impugned order is set aside and the grounds raised by the assessee are allowed for statistical purposes.

12. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 17/08/2023

Sd/-	**Sd/-**
G.S. PANNU	**SANDEEP SINGH KARHAIL**
PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 17/08/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai