IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI PRASHANT MAHARISHI, VICE PRESIDENT
AND
SHRI PRAKASH CHAND YADAV, JUDICIAL MEMBER

ITA Nos.1113 & 1114/Bang/2023
Assessment years : 2013-14 & 2014-15

Eurofins Peenya Resources Private Limited, (formerly Eurofins Advinus Ltd.) No.21 & 22, Phase II Peenya Industrial Area, Bangalore – 560 058. **PAN: AAFCA 2502B**	Vs.	The Deputy Commissioner of Income Tax, Circle 2(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Padamchand Khincha, CA
Respondent by	:	Shri D.K. Mishra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	19.11.2024
Date of Pronouncement	:	13.12.2024

O R D E R

Per Prashant Maharishi, Vice President

1. These appeals are filed by Eurofins Peenya Resources Private Limited, (the assessee/appellant) for the assessment years 2013-14 & 2014-15 involving identical issues and therefore these appeals are disposed of by the common order.

2. First we take up ITA No.1113/Bang/2023 for AY 2013-14 which has been filed by the assessee against the appellate order passed by the National Faceless Appeal Centre, Delhi (NFAC) [ld. CIT(A)]

dated 19.10.2023 wherein the appeal filed by the assessee against the assessment order dated 29.3.2022 passed u/s 144B r.w.s. 147 of the Income-tax Act, 1961 (the Act) by the National Faceless Assessment Centre (ld. AO) was dismissed. Therefore, assessee is aggrieved and has preferred this appeal before us.

3. The assessee has raised the following grounds:-

"1. **General Ground**

1.1. The order passed by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi (hereinafter referred to as CIT(A). NFAC) under section 250 of the Act and the order passed by the Deputy Commissioner of Income Tax, Circle 2(1)(1), Bangalore (hereinafter referred to as learned AO) under section 147 rws 144B of the Act are bad in law and liable to be quashed.

2. **Grounds relating to notice issued under section 148 and proceedings under section 147**

2.1. The learned Assessing officer has erred in not appreciating that an assessment under section 143(3) has been made for the relevant assessment year. The learned assessing officer has erred in reassessing the income for the assessment year after the limitation period of four years from the end of the assessment year. as provided in the first proviso to the erstwhile section 147.

2.2. The learned assessing officer has erred by not appreciating the fact that the disallowance of payments to foreign vendors for non-deduction of TDS. is a subject matter of appeal before the Commissioner of Income Tax (Appeals) filed by the Appellant against the order us 201 issued for the same assessment year. The learned assessing officer has thus erred in reassessing income under section 147 involving a matter which is already a subject matter of appeal, in violation of third proviso to erstwhile section 147.

2.3. The learned assessing officer erred in issuing the notice under section 148 dated 31.3.2021. on 1.04.2021 as applicable under the provisions that existed before the substitution of section 148 by Finance Act 2021 w.e.f. 1.04.2021.

2.4. The learned assessing officer erred in not following the procedure laid down by the substituted provisions of section 148 and section 148A of the Act effective from 01.04.2021.

2.5. The learned assessing officer has erred in not appreciating the fact that the procedure for re-assessment is a procedural law and hence has to be read as it exists on the date on which such procedure is being carried out and not the date on which the proceedings were initiated.

2.6. The learned assessing officer has erred in not appreciating that in absence of any legislative intent expressed either under the Finance Act, 2021 or under the Act, to preserve any part of the pre-existing Act, the reassessment proceedings pursuant to a notice issued under the erstwhile provisions before 01.04.2021 cannot be continued on or after 01.04.2021.

2.7. The learned assessing officer has failed to appreciate that the foreign payments made in respect of AMC and Maintenance charges were a subject matter of the scrutiny assessment under section 143(3) of the Act and related disallowance made vide the order under section 143(3) were settled under the Direct Tax Vivad se Vishwas Act, 2020. The learned assessing officer has erred in reopening assessment under section 147 on mere change of opinion. which is bad in law and liable to be quashed.

2.8. On facts and circumstances of the case and law applicable, notice under section 148 dated 31.3.2021, consequential proceedings and the assessment order passed under section 144B read with section 147 is invalid, bad in law and liable to be quashed.

3. **Grounds relating to principles of natural justice**

3.1. The CIT(A), NFAC has erred in not providing any cogent reasons in its order under section 250 of the Act, for treating the payments to foreign vendors for AMC and maintenance charges_ taxable as Fees for technical services. Thus, the CIT(A), NFAC has erred in not passing a speaking order.

3.2. The CIT(A) has erred in stating that no supporting documents have been provided by the Appellant in support of its claims, without considering the data submitted under the 147 proceedings and proceedings before the CIT(A), NFAC.

3.3. The CIT(A) has erred in passing a mechanical order without considering the submissions of the Appellant and without application of mind.

3.4. On facts and circumstances of the case and law applicable, the order under section 250 of the Act is against the principles of natural justice and is invalid, bad in law and liable to be quashed.

4. Grounds relating to treating AMC and maintenance charges as taxable

4.1. The learned assessing officer and the CIT(A). NFAC have erred in treating the payments for AMC and Maintenance charges of Rs. 49.17,872 as fees for technical services under section 9(1)(vii) of the Act.

4.2. The learned assessing officer and the CIT(A), NFAC have erred in not appreciating that certain payments classified as AMC and maintenance charges were in the nature of purchase of spares and other maintenance equipment and will thus not be taxable in India in the absence of permanent establishments of such foreign vendors in India.

4.3. Without prejudice to the above, the learned assessing officer and the CIT(A). NFAC have erred in not adopting the beneficial provisions under the Double Tax Avoidance Agreements.

4.4. The learned AO and the CIT(A). NFAC have erred in not appreciating that payments for annual maintenance contracts shall

not constitute fees for technical services under relevant articles of the Double Tax Avoidance Agreement as the make available condition is not satisfied.

4.5. Based on the facts and circumstances of the case and law, payments for AMC and maintenance charges were not chargeable to tax as technical services as per the provisions of the Act and DTAA.

5. **Ground relating to deduction of tax at source on payments made to non-residents-Section 195 and disallowance under section 40(a)(i)**

5.1. The learned AO and CIT(A). NFAC have erred in not appreciating that payments made to non-residents for AMC and maintenance charges amounting to Rs. 49.17.872 were not chargeable to tax in India under the provisions of the Income tax Act. 1961/ Double Taxation Avoidance Agreements and provisions of section 195 are not applicable.

5.2. The learned assessing officer and the CIT(A), NFAC erred in not considering the judgement of the Apex court in the case of GE India Technology Center Pvt Ltd, which clarified its observation in Transmission Corporation of AP Ltd case relied on by the assessing officer in its order under section 147 of the Act. The learned assessing officer and CIT(A), NFAC failed to appreciate that when the payer is reasonably certain that the payments are not chargeable to tax whether under the provisions of the Act or the DTAA. it shall not be liable to approach the department under section 195(2) or 197 of the Act.

5.3. The learned AO and CIT(A), NFAC have erred in making disallowance of the payments made to foreign vendors for AMC and maintenance charges under section 40(a)(i). when the same are not liable to tax deduction under section 195 of the Act.

5.4. On facts and circumstances of the case and law applicable, payments made to non-residents were not Chargeable to tax in India under the provisions of the Income tax Act, 1961/ Double Taxation Avoidance Agreements and consequently the

disallowance made under section 40(a)(i) of amounting to Rs. 49,17,872 should be deleted."

4. The brief facts of the case show that assessee is carrying on technical testing and analysis, drug discovery and research business in its earlier name of Advinus Therapeutics Ltd. It filed return of income on 29.11.2023 at a loss of Rs.30,68,86,825. This return was picked up for scrutiny and resulted into an assessment order u/s. 143(3) of the Act determining a total loss at Rs.8,16,20,329.

5. Subsequently the case of assessee was reopened u/s. 147 of the Act by issue of notice u/s. 148 on 31.3.2021. The main reason for reopening of the assessment is that the International Taxation Officer forwarded information that assessee has made payment of Rs.49,17,872 during the AY 2013-14 to a non-resident service provider vendor on account of annual maintenance contract (AMC) and maintenance charges without making tax deduction at source. As these payments are in the nature of fees for technical services, provisions of section 40(a)(i) is applicable in this case. Therefore, on corelation of these details with records of assessee, the ld. AO formed a reason to believe that an amount of Rs.49,17,872 paid without tax deduction at source to a non-resident is wilful act of the assessee to reduce the taxable income. Thus, this amount has escaped assessment within the meaning of section 147 of the Act. Notice u/s. 143(2) of the Act was issued on 16.11.2021. The assessee filed its objection on 30.11.2021 which was disposed on 17.1.2022. Assessee was asked to show cause the above.

6. The assessee submitted that liability to deduct tax at source u/s. 195 of the Act arises only when income is chargeable to tax in India as per the Act. The recipient does not have any business connection in India and therefore such sum is not liable to tax in India. The assessee also referred to DTAA Article 13(4)(c) and stated that mere rendering of the services will not result taxability of income in India. It was further stated that the condition of 'make available' is also not satisfied.

7. The ld. AO rejected all the contentions of the assessee and held that assessee is required to deduct tax at source u/s. 195 of the Act and therefore disallowance of Rs.14,17,872 was made as per the reassessment order dated 29.3.2022.

8. The assessee preferred appeal before the ld. CIT(A) challenging the reopening of assessment as well as the addition on merits. The ld. CIT(A) confirmed the action of the ld. AO and dismissed the appeal of assessee. Therefore, appeal is in appeal before us.

9. The ld. AR, Mr. Padamchand Khincha, CA, referred to the paperbooks filed and submitted that against the original assessment order, the assessee preferred appeal before the ld. CIT(A) wherein the appeal of the assessee was dismissed. Thereafter The assessee has filed an application under the Vivad Se Vishwas Act, 2020 (VSV Act) for the same assessment year on 8.2.2020 which is placed at page 249 of the PB against which Form 5 has been issued

to the assessee on 22.3.2021. Therefore, when the issue has been settled under the VSV Act, reopening could not have been made by the ld. AO for that assessment year. He referred to the original assessment order passed in the case of assessee u/s. 143(3) of the Act wherein also there is a disallowance of AMC charges. He referred to para 8 of original assessment order where the non-deduction of tax at source on AMC charges was disallowed of Rs.23,23,660 u/s. 40(a)(ia) of the Act for violating the provisions of section 195 of the Act. Therefore, his argument was that whatever addition, subsequent to the original assessment order was on account of non-deduction of tax at source on payment made to resident, and now AO desires to reopen the case of the assessee with respect to payment made to the non-resident. He referred to the decision of the Hon'ble Madras High Court in 140 taxmann.com 394 and submitted that one cannot be allowed to look at the fact of the same argument, if assessment is covered by VSV Act disclosure. He further referred to the decision of the Hon'ble Gujarat High Court in the case of 154 taxmann.com 240 and 156 taxmann.com 264.

10. He submitted that the facts of AY 2014-15 are also similar, therefore his argument was that reopening of assessment for both the years is bad in law on this ground.

11. He further referred to the reasons recorded for reopening placed at page 358 of the PB, which is a notice u/s. 148 of the Act. Further

at page 392 of PB the reasons for reopening were placed. He read the reasons recorded dated 26.8.2021 and submitted that the information as received from ITO, International Taxation, Ward 1(1), Bangalore, based on which the AO has reopened the assessment. Therefore, it is a borrowed opinion.

12. He further submitted that as in the original assessment proceedings the ld. AO has applied his mind on the facts of the issue and examine the same in detail, there is change of opinion now for reasons recorded for reopening of the assessment which is not valid. He referred to the various notices and reply furnished during the course of assessment proceedings.

13. Lastly, he submitted that notice u/s. 148 of the Act was issued to the assessee for AY 2013-14 on 31.3.2021 with the reasons recorded which are placed at page 392-293 of the PB. It was submitted that the reopening of the assessment is made beyond four years from the end of the assessment year and therefore in such a situation, the AO can get a right to reopen the assessment only if there is an allegation in the reasons recorded that escapement of income is on account of failure on the part of assessee. He submits that on the reading of the whole of the reasons, there is no such allegation by the AO. Therefore, on this ground itself, the reassessment proceedings deserves to be quashed. For this proposition, he referred to the decision of the Hon'ble Karnataka High Court in the case of *CIT v. Canara Bank, 155*

taxmann.com 289 against which the Special Leave Petition is also dismissed by the Hon'ble Supreme Court in *155 taxmann.com 290.* He submitted that where the AO in the reasons for reopening of assessment had not even stated or alleged that there was a failure on the part of the assessee to disclose fully and truly all material facts, in the absence of such an allegation, reopening of assessment initiated beyond four years is bad in law. He further referred to the decision of the Hon'ble Bombay High Court in the case of *Hindustan Lever Ltd. v. R.B. Wadkar, ACIT, 268 ITR 332 (Bom)*. In view of this, he submitted that reopening of assessment cannot be sustained.

14. The ld. CIT(DR), Mr. D.K. Mishra, vehemently supported the orders of lower authorities and stated that in the original assessment proceedings the addition made by the ld. AO was with respect to non-deduction of tax at source on AMC charges paid to domestic parties. Based on this, the additions were made which were confirmed by the ld. CIT(A). Against this, the assessee preferred application under the VSV Act which has been accepted. There was no issue in those appeals against the non-deduction of tax at source and consequent disallowance on payment made to non-resident. Therefore, the issue which has been settled in appeal in the impugned assessment year was on altogether different issue. The VSV Act has settled the dispute of a particular tax on a particular issue, it did not cover any other issue, may be for the

same assessment year. Therefore, the argument of the assessee that reopening could not have made when the appeal for AYs 2013-14 & 2014-15 are settled under the VSV Act, 2020, cannot be accepted. He further referred to the decision cited by the ld. AR of Hon'ble Madras High Court in the case of *Gopalakrishnan Rajkumar v. PCIT (2022) 445 ITR 577 (Mad)* stating, that decision has been rendered with respect to section 263 of the Act and not u/s. 147 of the Act and therefore does not apply.

15. He further referred to the decision of the Hon'ble Gujarat High Court in the case of *Amitkumar Chandulal Rajani v. PCIT [2023] 154 taxmann.com 240 (Gujarat)* which was also u/s. 263 of the Act and similar is the case in 156 taxmann.com 267. Therefore, he submitted that there is no infirmity for reopening of the assessment.

16. With respect to change of opinion, it was submitted that only when the order u/s. 201 was issued, the AO has come to know about the payment to non-resident of similar sum without deduction of tax at source. Therefore, this issue was not therefore before the AO during the original assessment proceedings and hence there cannot be an argument that reassessment is on account of change of opinion.

17. On the issue that there is no allegation in the reasons recorded for reopening of assessment that there is a failure on the part of assessee, he referred to the basis for forming reason to believe and details of escapement, wherein it is categorically stated that there is a wilful act of assessee in order to reduce its taxable income for payment to non-resident without deduction of tax at source not disallowed and therefore it should be sufficient enough to invoke the provisions of section 147 of the Act.

18. In the rejoinder, the ld. AR vehemently submitted that decisions of Gujarat High Court though are on section 263 of the Act, they apply with equal force in the reassessment proceedings also because the same issue cannot be reagitated when it was settled under VSV Act. On other arguments, he reiterated his original arguments.

19. We have carefully considered the rival contentions and perused the orders of ld. lower authorities. The facts clearly show that a notice u/s. 148 was issued for AY 2013-14 on 26.8.2021 and reasons were recorded on the same date which are as under:-

> "2. **Brief details of information collected / received by the AO**:
>
> The ITO, International Taxation, ward-1(1), Bangalore has forwarded the information vide letter in F.No. AAFCA2502B/ITO W-1(1)/Intl. Taxn./2019-20 dated

20.03.2020 as per which the assessee company has outsourced certain services to global service providers being non - resident entities. The assessee has made payments under the head AMC & Maintenance charges which is in the nature of fee for technical charges.

1. **Analysis of information collected/ received**:

It is seen from the P&L account that the assessee has debited maintenance charges. The International Taxation officer has forwarded the information that the assessee has made payments of Rs. 49,17,872/- during the assessment year 2013-14 to non-resident service providers/vendors on account of AMC & Maintenance charges without making TDS. Since these payments are in the nature of fee for technical services, section 40(a)(i) is applicable in this case.

1. **Findings of the AO**: It is seen from the order u/s. 143(3) dated 24.03.2016 that no addition has been made on this issue. Therefore 1 have reason to believe that income of Rs. 49,17,872/- has escaped assessment for the assessment year 2013-14. The provisions of section 147 are applicable to the facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

1. **Basis of forming reason to believe and details of escapement of income**:

The International Taxation officer has forwarded the information that the assessee has made payments of Rs. 49,17,872/- during the assessment year 2013-14 to non-resident service providers/vendors on account of AMC & Maintenance charges without making TDS. Since these payments are in the nature of fee for technical services, section 40(a)(i) is applicable in this case.

> In a light of the information received from International Taxation officer and correlation of the same with records of M/s Eurofins Advinus Ltd. (Formerly known as Advinus Therapeutics Ltd), for A.Y.-2013-14, the undersigned has reason to believe that an amount of Rs.

> 49,17,872 /- paid to non-resident service providers/vendors on account of AMC & Maintenance charges without making TDS is wilful of act of the assessee in order to reduce its taxable income. In light of the same undersigned has reason to believe that an amount to tune of Rs. Rs. 49,17,872 /- has escaped assessment within meaning of section 147 of Income-tax Act."

20. According to the provisions of section 147 of the Act, if the AO has reason to believe that income chargeable to tax has escaped assessment for any assessment year, subject to the provisions of section 148 to 153, he has every right to assess or reassess such income and also any other income which has escaped assessment and comes to his notice during the reassessment proceedings. However, there is one fetter to his right, i.e., if any action has to be taken after the expiry of four years from the end of the relevant assessment year, he could make the reassessment order assessing such income, only if the income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of assessee:-

    (i) to make a return u/s. 139;
    (ii) to make a return in response to a notice u/s. 142(1);
    (iii) to make a return u/s. 148; or
    (iv) to disclose fully and truly all material facts necessary for his assessment for that assessment year.

21. Therefore, in the case of reassessment proceedings initiated after the expiry of four years, the AO can assume jurisdiction for reassessment only after the above conditions are satisfied.

Satisfaction of the above conditions are required to be mentioned in the reasons recorded for reassessment only because it is where he gets a power to reassess the income. Thus, apparently, it is mandatory that such statement of facts are required to be mentioned in the reasons recorded itself, because reasons have to be read as they are recorded by the AO, without any substitution or deletion and any inference.

22. Thus, if notice u/s. 148 is to be issued after expiry of four years, the assessee should have failed to disclose material facts and the ld. AO should have alleged and based his reasons to believe on that fact of non-disclosure by the assessee. If the AO does not state or allege that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the said assessment year, any other authority cannot infer or improve up on such reasons so recorded, therefore absence of such necessary jurisdictional facts mentioned in reasons, such reopening of the assessment cannot be upheld. The Hon'ble Karnataka High Court in the case of *CIT v. Canara Bank, 155 taxmann.com 289* has categorically held so in para 16 of that order. Such is the view expressed by Hon'ble Bombay High Court also.

23. Merely because the AO has mentioned that non-disallowance of payment to non-resident without deduction of tax at source is a wilful act of assessee in order to reduce its taxable income is also an allegation that assessee has failed to disclose fully and truly all

material facts, we do not find any reason to compare these findings of the AO for allegation of failure on the part of assessee for disclosure. Therefore, on this solitary ground, we quash the reassessment order passed by the ld. AO.

24. An argument is raised by the learned authorised representative that when the dispute is settled for a particular assessment year involving same point in VSV 2020, the learned assessing officer could not have reopened the assessment on the same issue. Firstly, you like to state that in this case originally additions were made for non-deduction of tax at source with respect to the payment made to the resident Indian, whereas the issue involved in the reopening of the assessment is with respect to payment made to the non-resident. According to provisions of section 5 of VSV 2020 Act on matters stated in the application for settlement of disputes are covered therein. In this case, the matter settled in the VSV Act and the matter for which reopening is made are two different issues and therefore there is no infirmity in the action of the learned assessing officer in not considering that the matter settled in VSV 2020 is the same as involved in the reopening. The judicial precedents cited before us are in fact related to section 263 of the income tax act, but those decisions have quashed the revisionary proceedings only for the reasons not the matter settled in that scheme and the matter for which the revisionary proceedings are initiated are same.

Therefore, we dismiss this argument of the learned authorised representative.

25. Accordingly, ground no. 2 relating to reopening of the assessment is allowed as indicated above.

26. In view of our decision on ground no.2, all other grounds of appeal become infructuous and hence dismissed.

27. In the result, the appeal for AY 2013-14 is partly allowed.

28. ITA No.1114/Bang/2023 for AY 2014-15 is also on identical facts and circumstances where the ld. CIT(A) passed the appellate order dated 19.10.2023 wherein the appeal filed by the assessee against the reassessment order dated 29.3.2022 passed u/s. 144 r.w.s. 147 of the Act by the ld. AO was dismissed with respect to the reopening of assessment as well as on merits of the case.

29. Both the parties categorically submitted that so far as reopening of assessment is concerned, are identical to AY 2013-14.

30. As we have already decided this issue for AY 2013-14 in the case of assessee wherein we have quashed the reassessment proceedings and undisputedly the facts are similar, we also quash the reassessment proceedings for AY 2014-15. Accordingly, we allow ground no.2 of the appeal against the reopening of assessment and dismiss all other grounds of appeal as infructuous.

31. Accordingly, both these appeals of assessee are partly allowed.

Pronounced in the open court on this 13th day of December, 2024.

Sd/-	Sd/-
(PRAKASH CHAND YADAV) JUDICIAL MEMBER	(PRASHANT MAHARISHI) VICE PRESIDENT

Bangalore,
Dated, the 13th December 2024.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. Pr. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.