

**IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH, 'C', BANGALORE**

**BEFORE SHRI A.K GARODIA, ACCOUNTANT MEMBER
SHRI LALIET KUMAR, JUDICIAL MEMBER**

IT(TP)A No.840//Bang/2013 Asst. Year – 2008-09
IT(TP)A No.1042//Bang/2013 Asst. Year – 2008-09

G.E India Exports Pvt. Ltd.,
(Formerly GE Power Controls India (P) Ltd.,
42/1 & 45/14, Electronic City, Phase II
Bangalore-561 229. . Appellant

PAN No.AABCG 1257B.

Vs.

The Dy. Commissioner of Income-tax,
Circle-11(3),
Bangalore. . Respondent

Appellant by : Shri Rajan Vora, C.A

Assessee by : Shri G.R Reddy, CIT

Date of Hearing : 13-02-2017

Date of Pronouncement : 20-04-2017

ORDER

PER LALIET KUMAR, JUDICIAL MEMBER

These appeals by the assessee are directed against the order passed by the Commissioner of Income-tax (Appeals) – IV, Bangalore dated 2/4/2013 for the assessment year 2008-09, .

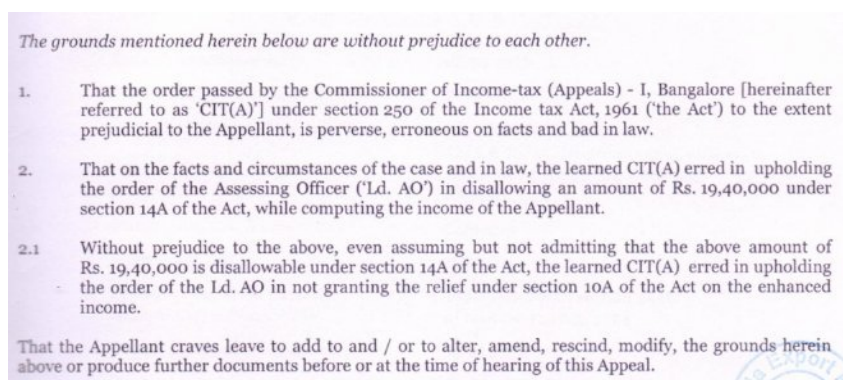
2. The GE India Exports Private Limited (“GEIE” or “Appellant” or “Assessee” or “Company”), formerly known as GE Power Controls (India) Private Limited, is a subsidiary of GE Mauritius Infrastructure Holdings Ltd and is engaged in the business of provision of development and engineering design services (“software development”), engineering consultancy services and customer support services(in the nature of IT Enabled Services [“ITES”]). The company is eligible for deduction under Section 10A of the Income-tax Act, 1961(“the Act”) in respect of its income from various units registered with the Software Technology Parks of India (“STPI”).

3. GEIE provides ITES in accordance with specific directions, guidelines and criteria established by the Associated Enterprise (“AE”). The customer support services include handling the queries of credit card customers of AE through the call centre located at Hyderabad and providing other back end support to credit cardholders. The pricing for such services is done on the basis of actual cost plus mark-up. GEIE, through its 100% export oriented units, also provides software development services in accordance with the directions, guidelines and specifications provided by the AEs. Under this segment, GEIE also provides IT project management, IT infrastructure management, application management and other forms of support for IT operations to the AEs. The pricing for all the services is done on the basis of actual cost plus mark-up. Further, GEIE is characterized as captive service provider in respect of provision of ITES and software development services.

First we shall take up the appeal in IT(TP)A No.840/Bang/2013 for the assessment year 2008-09.

IT(TP)A No.840/Bang/2013

4. The grounds raised by the assessee are as under:



5. The only issue raised in this appeal is regarding disallowance of Rs.19,40,000/- u/s 14A of the Act not granting relief u/s 10A of the Act on the enhanced income.

6. During the year under consideration, the assessee earned dividend income of Rs.2,56,08,000/-. The said dividend income was earned on the investment of Rs.3,88,000,000/- made by the assessee alleged out of its own fund in the cumulative average investment of GE Industrial Pvt. Ltd. It was the case of the assessee that the assessee had not incurred any expenditure in earning such dividend income. The

AO had disallowed an amount of Rs.19,40,000/- considering the same as expenditure incurred in relation to exempt income and by applying the provision of sec. 14A r.w. Rule 8D of the Income-tax Rules. The AO in the assessment order referred as under:-

Expenditure on exempt income u/s 14A:

Further on verification of the details filed, it was observed that the assessee has received exempt income by way of dividend of Rs. 2,56,08,000/- and has not debited any expenditure to earn the exempt income as required as per the provisions of the Sec. 14A r.w. Rule 8D of the Income-tax Rules. During the course of assessment proceedings the assessee's AR was asked to furnish the details of expenditure attributable to earn exempt income. In response assessee's AR filed a letter dt. 24.10.2011 contending that section 14A is not applicable in the present case relying on various case laws. As I am not satisfied with the explanation offered by the assessee's authorized representative, I proceed to bring to tax the expenditure on exempt income as follows:

Average investment x 0.5%

2

$\frac{388000000 + 388000000}{2} \times 0.5\% = \text{Rs. } 19,40,000/-$

2

The expenditure on exempt income works out to Rs. 19,40,000/- and the same is brought to tax.

The draft asst. order dated 8.12.2011 was forwarded to the assessee vide letter dated 8.12.2011. The assessee filed a letter dated 10.1.2012 stating that based on the clarification issued by the CBDT dated 20.1.2010 the assessee company does not intend to file objection against the draft assessment order before the Dispute Resolution Panel and requested this office to pass final assessment order.

7. Feeling aggrieved by the order, the assessee preferred an appeal before the CIT(A). The Id CIT(A) in paragraph 177 to 179 held as under:-

“177. I have carefully considered the appellant's submissions. The AU has disallowed an amount of Rs. 19,40,000 as expenses attributable to the exempt income of R.S. 29,40,000. The appellant contends that it had not incurred any expenditure in earning the exempt income and hence no disallowance was warranted. Section 14A(3) provides that the AU shall determine the amount of expenditure incurred in relation to income which does not form part of the total income in accordance with the prescribed method, also in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income. The formula prescribed in Rule 8D(2)(ii) shows that a disallowance under section 14A can be made even where no expenditure is found to have been incurred for earning the exempt income.

178. I do not subscribe to the view that since section 14A(3)

was inserted with effect from 01.04.2007, it cannot be applied in relation to AY 2005-06. Since the assessment in this case was completed only on 30.01.2012, i.e., well after the amendment to section 14A came into operation, the AU was bound to follow the law as it existed at the time the assessment order was passed. Proviso to section 14A that the AO is not empowered to reassess any income under section 147 or pass a rectification order under section 154 for any AY beginning on or before 01.04.2001. In the present case, the assessment was neither sought to be reopened under section 147, nor rectified under section 154, nor did the assessment relate to any AY prior to 01.04.2001.

179. The decision of the hon'ble High Court of Karnataka in the case of Ltd. v. KIT (supra) was in relation to a dealer in shares and securities who had sold part of the shares it had purchased by availing an interest-free loan. The hon'ble High Court was pleased to hold that when the assessee had not retained shares with the intention of earning dividend income and dividend income was incidental to his business of sale of shares which remained unsold by assessee, it could not be said that expenditure incurred in acquiring shares had to be apportioned to extent of dividend income and that should be disallowed under section 14A. It is clear that the

facts and circumstances of CCI Ltd. were completely different from those of the present case where the appellant is neither a dealer in shares and securities, nor has it sold any shares. Thus, the ratio of the case cited by the appellant does not apply to the facts of its own case.”

8. Before us, the Id AR has submitted that no expenses in relation with the earning of dividend income were incurred.

9. The Id AR has submitted that the assessee has not incurred any expenditure, therefore, the provision of sec. 14A is not applicable. It is submitted that there should be proximate cause for disallowance which is in relation to the tax exempt income. In the absence of proximate cause, the disallowance u/s 14A of the Act cannot be invoked. The Id AR relied upon the judgment of CIT Vs. Karnataka State Industrial & Infrastructure Development Corpn., Ltd. [2016] 65 taxmann.com 295 to say that the recording of the satisfaction by the AO is necessary before calculating the amount under Rule 8D. It is submitted that if the assessee is having interest free fund available then it is presumed that the assessee had made the investment from interest free eve if there is some

borrowing of loan by the assessee.

10. We have heard rival contentions of the parties and perused the records. The AO while embarking upon calculating expenditure on the exempt income in terms of the provision of sec. 14A have only mentioned his satisfaction, in literally manner , however has not given the detailed reasons and has merely mentioned that he **is not satisfied with the explanation offered by the assessee.** In our view, it is the duty of the AO to record the satisfaction for not satisfied with the explanation given by the assessee with respect to not incurring any expenditure by the assessee in respect of the extent income. In the present case, the AO has merely mentioned that he is not satisfied with the explanation, therefore, in our view, the AO has recorded the satisfaction for the compilation of Rule 8D. No specific format is provided under the act for recording the satisfaction. Assessee has failed to discharge his primary onus of proving nexus of interest free funds available at the time of making the investment that has yielded the interest free income , in our view, in the absence of discharge of initial onus the burden is not shifted to AO to establish nexus between the

interest bearing funds and the investment made by the assessee. As the AO has recorded his dissatisfaction regarding the correctness of the claim of the assessee in respect of expenditure (Nil) which the assessee claimed to have been incurred in relation to the income which does not form part of the total income. After recording dissatisfaction, the AO is left with no other option but to adopt the methodology provided in Rule 8D r.w.s 14A(2) of the Act. In the present case, the AO has only applied 0.5% of the total income as expenditure. In our view, the AO has rightly applied the Rule 8D and no error has been pointed out by the ld AR on working out of the expenditure by applying the Rule 8D. In our view, the AO has worked out the expenses after due application of the methodology, therefore, the ground raised by the assessee is required to be rejected.

Therefore, in the light of the above, this ground of the is dismissed .

11. The ground appeal of the assessee at 2.1 is as under:

“Without prejudice to the above, even assuming but not admitting that the above amount of Rs.19,40,000/- is disallowance u/s 14A of the Act, the ld CIT(A) erred in upholding the order of the ld AO in

not granting the relief u/s 10A of the Act on the enhanced income.”

In this regard, the Id AR has submitted that in case this Tribunal disallows the ground 2.1 and held that the sec. 14A is applicable for instant case then in such eventuality, the expenditure should be added back to the income of the undertaking and deduction u/s 10A should be allowed on such enhanced income.

The CIT(A) in paragraph 173 of the order records the submission of the assessee in the following manner:-

“Deduction u/s 10A was allowed on profits earned by the appellant form of the business of its undertaking. Any adjustment made during the computation of income under the head profits and gains of business or profession increased the profit of the business of the undertaking which was then eligible for tax holiday benefits. The provisions of sec. 10A did not provide for any limitation the grant of tax holiday on any additions made. It was only the provisions of sec. 92C which provided for a

limitation on grant of tax holiday u/s 10A on adjustments made to ALP determined by assesses, implying that all the other adjustments made were eligible for tax holiday deductions.”

The ld AR for the assessee further relied upon the judgment of Pune Bench of the Tribunal in the case of ITO Vs. Kalbhor Gawade Builders in ITA No.386/PN/2011, the decision of Hon’ble Bombay High Court held in the case of CIT Vs. Gem Plus Jewellery India Ltd., 330 ITR 175 and judgments of Hyderabad Bench in the case of Bartronics India Ltd. Vs. ACIT in ITA No.2188 & 2189/Hyd/2011.

On the other hand, the ld DR has submitted that the judgment relied upon by the ld AR are not applicable to the facts and circumstances of the case. Further, it was contended that for the purposes of sec. 10A , the income which is derived by an undertaking from the export of article etc. allowable as deduction from the total income of the assessee. The judgment referred by the ld AR viz., iNautix Technologies India (P) Ltd., was on different facts and in fact. The

coordinate bench in the matter of iNautix Technologies India (P) Ltd., has relied upon the judgment of Bombay High Court in Gem Plus Jewellery India Ltd., (Supra) wherein it was held that the assessee was entitled to exemption u/s 10A with reference to addition or disallowance of various payments as the plain consequence of disallowance and add back made by the AO is increased in the business profit of the assessee.

12. We have considered the rival submissions and we find force in the submissions of the learned AR of the assessee on this issue because if part of expenses claimed by the assessee against business income is considered as expenses incurred for earning tax free income and is disallowed u/s 14A, the business income stands increased by that amount and only such increased business income should be considered for computing the amount of deduction u/s 10A. A. O. is directed accordingly.

13. In the light of the above, the appeal of the assessee is partly allowed for statistical purposes.

IT(TP)A No.1042/Bang/2013 (Revenue's appeal)

14. The grounds raised by the Revenue are as under:

1. The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.
2. The Ld.CIT(A) has failed to appreciate that the different year ending filter applied by the TPO is necessary to exclude companies which do not have the same or comparable financial cycle as the tested party.
3. The Ld. CIT(A) erred in excluding the comparable companies like Aditya Birla Minacs , Coral Hubs , Eclerx , Jindal Intellicom , Mold-Tek and Allse Technologies Ltd on the basis of Abnormal Profit without defining what constitutes abnormal profit filter and how the same is determined.
4. The learned CIT (A) erred in holding that M/s Genesys International Corporation Ltd. being functionally different, cannot be taken as comparable without appreciating the fact that he himself has held that services the being in the nature of ITES services, it is not necessary for the TPO to go into the horizontal and vertical segments of the same sub segment.
5. The learned CIT (A) erred in rejecting Genesys International Corporation Ltd as a comparable without identifying any extraordinary variable which would distinguish this company from the taxpayer in terms of functions performed, assets used and risk undertaken i.e. quantitative and qualitative analysis.
6. The CIT(A) erred in directing the AO to recompute the deduction allowable u/s 10A of the I. T . Act after reducing the communication expenses amounting to Rs. 22,95,328/- from the total turnover also.
7. The learned CIT(A) erred in not appreciating the fact that there is no provision in section 10A which requires the concerned expenses; which are required to be reduced from the export turnover as per clause (iv) of the Explanation to section 10A, to be reduced from the total turnover also .
8. The Ld. CIT(A) ought to have considered the fact that the jurisdictional High Court decision relied upon by him has not been accepted by the department and an SLP has been filed before Hon'ble Supreme Court
9. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.
10. The appellant craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.

15. With the respect of ground No.2, the Id DR for the Revenue has submitted that the CIT(A) *has failed to appreciate that the different year ending filter applied by the TPO is necessary to exclude companies which do not have the same or comparable financial cycle as the tested party.* The TPO has rightly excluded the companies which do not have the same or comparable financial cycle as that of the tested parties. On the other hand AR for the Assessee submitted that companies even though having different financial year ending, were operating during the same period of time similar to the Assessee and were also facing similar business cycles, market and economic conditions. Therefore, in the absence of any evidence available to the contrary that there has been a significant impact on the margins due to change in different reporting/ accounting period, it would be incorrect to consider the different year filter for disregarding comparable companies.

16. This Tribunal has taken consistent view in number of judgments stating that comparable company which could not be rejected on the ground of functionality cannot be rejected on the ground that it is following the financial year from January to December (i.e., calendar year). Though a comparable company following a different financial year may not be generally taken for comparability analysis, however, if financial data is available for all the quarters including January to March and it is otherwise possible to determine the value of the transaction as well as the profitability during the corresponding period, then it suffices the comparability criteria. Because, ultimately the core point in comparability analysis is to benchmark the margin of a given period of a comparable uncontrolled transaction with controlled transaction. If the financials of the corresponding period is available then it cannot be rejected simply on the ground that it has a different financial year. Assuming that instead of financial year i.e 1st April to 31st March, the comparable companies adopted the financial year from 1st January to 31st December and 3 months financials of the comparables are otherwise available in the

public domain then in our view it can be considered as comparable as different reporting/ accounting period would be not effect FAR analysis by TPO or by assessee, as financial for the year under consideration are derivable by reconstructing it on the basis of information available in public domain however this is subject to reporting of extraordinary event in the said three months which has an effect on profitability, expenses and sale of the comparable , thus making the comparable unfit. Hence, this ground is decided against the Revenue.

17. Ground No. 3 is with respect to exclusion of following six companies on the basis of abnormal profit.

Sl. No.	Company name
1	Eclerx Services Limited
2	Coral Hubs
3	Jindal Intellicom
4	Mold Tek Technologies Limited(Seg)
5	Aditya Birla Mincas
6	Allsec Technologies Limited

18. The assessee in the written submission has mentioned that the assessee has no objection with respect to Aditya Birla Minacs Worldwide Ltd., Jindal Intellicom Pvt. Ltd., and Allsec Technologies Ltd., and it was submitted that these comparable companies pass all the filters including the persistent operating losses filter.

19. We have heard the rival contentions of the parties. In view of the no objection given by the assessee, these companies are directed to be included as comparables with that of the assessee. Accordingly TPO/AO is directed to give effect by including these three companies into the list of comparables.

20. With respect to Corol Hubs, the Tribunal in the case of the assessee for the asst. year 2007-08 after taking into consideration of the decisions of the various High Court cited by the assessee at bar has directed the exclusion of the said company from the list of comparables. Accordingly we find no regularity in the order passed by the CIT (A) in excluding Corol Hubs. Earlier it was known as Vishal Infotech

Information Technologies Ltd. Accordingly this company is directed to be excluded.

21. The next company objected by the Revenue are eClerx and Mold-tek.

22. In this regard, the Tribunal in the order for the assessment year 2007-08 has held that these 2 companies are functionally similar to that of the assessee. The Tribunal in the earlier asst. year 2007-08 has held as under:-

“Mold Tek Technologies Limited (“Mold-Tek”)

13.6 The assessee has submitted that this company is not comparable with the assessee as the profile of the company is different. In the written submissions filed with the assessee it is mentioned as under:

6.1.2 In the case of Mold-Tek, the learned TPO has considered, the Engineering services in the nature of producing design drawings, detailed structural engineering drawings using 3D and 2D software specializing in civil, structural and mechanical engineering services, as comparable to the ITES segment of the Appellant. Mold-Tek has a strong team of highly skilled resources. Mold-Tek helps its clients to cut down design and development

costs of civil, structural, mechanical and plant design and delivered technologically superior outputs. The company also has in-house software development team, quality control training and troubleshooting facilities.

- 6.1.3 In this regard, the extract of segmental information from the annual report of Mold-Tek provided below (Refer page 749 of the paperback):

Segmentwise/productwise performance

The Company's business segments are Plastics & IT (KPO) Divisions. Further, plastics can be segmented to the lube & oils, paints, pet products, consumer products etc. areas. The sales performance during the year is:

- 6.1.4 The Hon'ble Members would appreciate the fact that the Engineering services being in the nature of KPO, is not comparable to the Appellant's activities. The Appellant reproduces the following extracts from the response of the company u/s133(6) evidencing these facts:

4. Description of Business activities

At Mold-Tek Technologies Limited we use software tools which are used to produce structural engineering outputs and these are delivered to our clients serving construction Industry segment. Our clients mainly located in Canada, USA, Europe, Dubai and Australia outsource Structural Design and Detailing work to us. Some of the target clients are engineering firms, Steel and Precast Fabricators, Detailing companies, etc. Our activities include producing Design drawings, detailed structural engineering drawings for our clients using 3D and 2D software.

- 6.1.5 In support of the above contentions, the Appellant relied upon the following judicial pronouncements:
- Societe Generale Global Solution Centre Pvt. Ltd.[IT(TP)A No.1188/Bang/2011] dated 22 Apr 2016 (**page 1514, 1516**)
 - Goldman Sachs Services Private Limited [IT(TP)A No. 1163/Bang/2014] dated 06 May 2016 (**page 1671 to 1678**)

- M/s. Pole to Win India Pvt. Ltd.(formerly e4e Tech Support (India) Pvt. Ltd.) Vs DCIT [I.T.(TP) A. No.1053/Bang/2011] dated 08 June 2016 (**page 1629**)
- M/s Ariba Technologies India Pvt. Ltd. Vs ITO, [IT(TP)A No.441/Bang/2012] dated 02 Feb 2016 (**page 1589, 1590**)
- Maersk Global Centres (India) (P) Ltd Vs. ACIT [ITA No.7466/Mum/2012] SB dated 07 Mar 2014; (**page 1762 to 1765**)

13.12 It was submitted that the profile of Mold-Tek was examined by the coordinate bench and after discussion it was found that the said company is not comparable with the company into ITEs segment.

eClerx Services Limited (“eClerx”)

13.13 The assessee has submitted that this company is not comparable with the assessee company as the profile of the company is different. In the written submissions filed by the assessee it is mentioned as under:

- 6.1.6 Based on the review of the Annual Report of eClerx, the Assessee would like to submit that this company is engaged in providing data process and analytics services which are in the nature of KPO. For the relevant FY, eClerx has employed over 1500 domain specialists working for its clients. eClerx offers industry specialized services for meeting complex client needs,

data analytics KPO services in two business verticals - financial services and retail and manufacturing. eClerx offers solutions that do not just reduce cost, but also help their clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. eClerx provides tailored process outsourcing and management services along with data aggregation, mining and maintenance services.

6.1.7 The relevant extract from the Annual Report of the company for FY 2007-08 is provided below;

7 Page 6 of the Annual report (Refer Page 818 of the Paperbook):

eClerx is a very different company, with industry specialized services for meeting complex client needs. We are sometimes compared to a BPO or an IT offshoring company, which we are not.

We are a data analytics KPO service provider specializing in two business verticals - Financial Services and Retail and Manufacturing. We provide solutions that do not just reduce cost, but help our clients increase sales and reduce risk, by enhancing efficiencies and by providing valuable insights that empower better decisions. We provide services to 50 large global corporations across multiple geographies.

7.1.2 Page 4 of the Annual report (Refer Page 816 of the paperbook):

We document everything we do, everything we learn, everything we change. We use this to develop our own training programmes, today covering more than 1,000 individual courses, exams and certifications. Then we put each of our employees through grueling training programmes, again and again. Imparting critical knowledge efficiently helps us to make our new staff effective quickly and mitigates the impact of attrition. Today, we employ over 1500 domain specialists working for our clients, working as *them*.

7.1.3 In support of the above contentions, the Appellant relied upon the following judicial pronouncements:

- Societe Generale Global Solution Centre Pvt. Ltd.[IT(TP)A No.1188/Bang/2011] dated 22 Apr 2016 (**page 1514 to 1516**)
- M/s. Pole to Win India Pvt. Ltd.(formerly e4e Tech Support (India) Pvt. Ltd.) Vs DCIT [I.T.(TP) A. No.1053/Bang/2011] dated 08 June 2016 (**page 1626, 1627**)
- M/s Ariba Technologies India Pvt. Ltd. Vs ITO, [IT(TP)A No.441/Bang/2012] dated 02 Feb 2016 (**page 1578 to 1580**)
- Maersk Global Centres (India) (P) Ltd Vs. ACIT [ITA No.7466/Mum/2012] SB dated 07 Mar 2014 (**page 1762 to 1765**)
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13.14 On the other hand, the Id DR has submitted that Mold-Tek and Eclerx Services is not comparable with the assessee company merely on the ground that that decision rendered in the some other matter it was submitted that TP study is a factual fact and statement is based on the FAR analysis and, therefore, each company and comparable has

its own unique features and is, therefore, required to be compared.

13.15 The assessee has entered into various agreements between the GE India exports Private Ltd., and its associated Enterprises. The scope of the service agreement for IT related services is given at page 420 of the paper book to the following effect:

II. SCOPE

A. GE GTS will perform the work scope specified in Addendum A attached hereto and made a part hereof. Ongoing communication shall be established between GE AVIATION and GE GTS whereby GE GTS shall take direction on specific roles and responsibilities of its employees and with respect to task to be performed and completed pursuant to Addendum A. If GE GTS foresees any difficulty at any time in meeting the requirements, timing or both specified in any such communication, GE GTS will notify GE AVIATION of such (as the case may be) and the parties shall promptly resolve any such issue to their mutual satisfaction. GE GTS shall provide and deliver to GE AVIATION all items

and deliverables specified in Addendum A and the ongoing communications received by GE GTS. Every such communication is hereby deemed to incorporate the provisions of this Agreement.

B. The deliverables under this Agreement are and shall be for the benefit of and shall be the exclusive property of GE AVIATION.

14. The Addendum A mentioned in scope of the said agreement provides as under:-

Addendum A

Work Scope Definition-

Following is an illustrative list of the roles GE GTS provides:

- 1) IT Team Leader
 - Lead and manage a team of IM program / project managers
 - Maintain and track individual programs and ensure alignment to the business CTQs
 - Help in S1 & S2 process for programs and be responsible for its wing to wing completion & business benefit.
- 2) Program Manager
 - Accountable for successful implementation of the IM programs in line with business CTQs
 - Own and manage large IM program deliverables, project teams & budgets independently
 - Secure necessary IT resources, funding, and business buy in
 - Identify and mitigate risks in timely manner, escalating to appropriate level when necessary,
 - Set up communication rhythms across program
- 3) Project Manager
 - Own, develop, manage and drive project plan
 - Owns technical project documentation, technical specifications, implementation & support specifications
 - Manage technical teams to implement technical design and development solutions
 - Drive IT change management and work with the business to ensure that the technical solution meets functional specifications
 - Be responsible for project life cycle from development through QA, production and support
 - Ensure standard processes and tools are followed in the project
 - Develop, maintain, and manage IM project budgets
- 4) Enterprise Architect/ Application Architect/ Design Architect
 - Direct overall strategies and standards relating to application, collaboration, infrastructure, and data
 - Develop enterprise architecture models, Review and validate application architectures/detailed technical designs
 - Provide guidance to teams seeking suggestions to solve technical issues & ensure architecture alignment with overall business objectives,
 - Ensure compliance with enterprise architecture standards
 - Ensure application integration with enterprise architectural framework
 - Ensure system interoperability, performance and scalability
 - Ensure integrity and sharing of required services and data across the enterprise
 - Develop and recommend appropriate technology stack for execution of IT projects
- 5) Business Analyst / Project Leader
 - Working with business users and related IM teams to create functional specifications and requirements for IM projects.
 - Develop subject matter expertise in various lines of business.
 - Analyze, document, and help redesign business processes in line with technology.
 - Assist and help validate technical designs.
 - Assist in the validation, testing, and deployment of new software applications.
 - Assist in User Acceptance Tests (UAT)
 - Utilize best practices for software development and project management.

- 6) Product Developer/Senior Product Developer
 - Analyse, design and develop (coding , unit testing, debugging) of software products
 - New feature addition, Enhancement and bug fixes for software products.
 - Participate in Code Reviews
 - Prepare project artifacts like Developer Requirement Specification (DRS), Design/architecture document, test case documents etc.
 - Provide status reports to Team Lead
 - Own domain knowledge
- 7) Product Quality Engineer/Senior Product Quality Engineer
 - Test analysis and design of AUT (Application Under Test) to generate detailed Test Cases using Requirements Specifications, Technical Specifications, Design Models, Early Visibility Software, other lifecycle work products
 - Ensure Requirements are traceable to Test Cases
 - Implement Test Cases as detailed Test Specifications/scripts for manual/ automated execution
 - Execute manual test specifications, recording and reporting results in accordance to the Test Plan
 - Participate in review of test artifacts - test designs, test cases, test scripts.
 - Monitor test automation runs of unit, component, integration and system tests for which responsible
 - Perform analysis of test failures to appropriate level of detail for defect submission
 - Assist in prioritisation of reported defects and works with Development to facilitate timely closure
 - Own domain knowledge
- 8) Technical Author/Senior Technical Author
 - Provide finished technology transfer material (complete printed and online product documentation, context-sensitive help and training material) for products that is high quality, complete and technically accurate
 - Responsible for writing, structuring, compiling, generating and testing online documentation and help
 - Preparation and testing of online documentation and help, including generation of HTML, HTML Help and PDF files with inputs from development team
- 9) Team Lead (Development)
 - Own specific piece of product (e.g. a module or even an entire product) for New feature addition, Enhancement and bug fixes
 - Analyse, design and develop (coding , unit testing, debugging) of software products
 - Coordinate amongst project teams – work allocation, status tracking etc.
 - Communicate Project status, issues, risks etc. to stake holders
 - Technically mentor Product Developers/Senior Product Developers
 - Own domain knowledge
- 10) Team Lead (QA)
 - Test analysis and design of AUT (Application Under Test) to generate detailed Test Cases using Requirements Specifications, Technical Specifications, Design Models, Early Visibility Software, other lifecycle work products.
 - Own testing efforts for specific pieces of products or entire product lines
 - Coordinate amongst test teams – work allocation, status tracking etc.
 - Communicate Project status, issues, risks etc. to stake holders
 - Technically mentor Product Quality Engineer/Senior Product Quality Engineer
 - Own domain knowledge

15. We have heard the rival contentions of the parties and perused the record. The judgment relied upon by the Id AR for the assessee was rendered in the case of Societe Generale Global Solution in ITA No.1188 of 2011 dated

22/4/2016 and in the said judgment the exclusion of Mold-Tek and Eclerx Services was considered on the basis of the assumption that the assessee before this Tribunal was not into KPO services and whereas Mold-Tek and Eclerx Services are into KPO services and the Tribunal relied upon the judgment of Hon'ble Delhi High Court in the matter of Rampgreen Solutions Ltd., has held that the KPO company cannot be compared with BPO, hence Mold-Tek and Eclerx Services are not required to be treated as comparable and, therefore, is required to be excluded.

16. We have gone through the profile of the assessee wherein it is stated that the assessee is providing specialized services and is not simply into BPO services provider as projected by the assessee. The work scope and the agreement of the assessee with its AE clearly provides that the assessee is providing high end technical services to its AE and for that purposes has engaged various technical staffs in the form of IT Team Leader, Program Manager, Project Manager, Enterprise Architect/Application Architect/Design Architect, Business Analyst/Project Leader, Product Developer/Senior Product Developer, Product Quality Engineer/Senior Product Quality Engineer, Technical Author/Senior Technical Author, Team Lead (Development), Team Lead (QA) and various functions of

these persons are provided in detail in the agreements. The kind of services each persons are rendering to the organization shows the scope and profile of the Assessee .

16. The judgment relied upon by the Id AR for the assessee was rendered in the case of Societe Generale Global Solution in ITA No.1188 of 2011 dated 22/4/2016 was rendered in the facts of said case and in the said judgment the exclusion of Mold-Tek and Eclerx Services was considered on the basis of the assumption that the assessee before this Tribunal was not into KPO services and whereas Mold-Tek and Eclerx Services are into KPO services and the Tribunal relied upon the judgment of Hon'ble Delhi High Court in the matter of Rampgreen Solutions Ltd., has held that the KPO company cannot be compared with BPO, hence Mold-Tek and Eclerx Services are not required to be treated as comparable and, therefore, is required to be excluded.

17. The reliance of the assessee in the matter of Ariba Technologies India Pvt. Ltd., in ITA No.441/Bang/2012 is also not correct. In paragraph 2, it is only mentioned that the assessee is engaged in providing software development and information technology enabled services. Further in the said judgment, Tribunal relied on the decision rendered in the case of Maersk Global Solution Vs. ACIT 147 ITD 83 and noted that in the said judgment it was held that this company cannot be compared with ordinary ITES. Further, it was mentioned that Arabia is only providing back office support to the parent

company, whereas Mold-tech is engaged in producing design, drawing and structural engineering drawings of 2D and 3D software cannot be compared with the assessee. In the matter of Maersk Global Solution (Supra) it is mentioned in paragraph 81 as under:-

81. In so far as the case of Mold-Tek Technologies Ltd. is concerned, it is observed from the annual report of the said company for the financial year 2007-08 placed at page 139 to 151 of the paper book that the said company was pioneer in structural engineering KPO services and its entire business comprised of providing only structural engineering services to various clients. Further information of Mold-Tek Technologies Ltd. available on their Website is furnished in the form of printout at page 158 to 165 of the paper book and a perusal of the same shows that it is a leading provider of engineering and design services with specialization in civil, structural and mechanical engineering services. It is stated to have a strong team of skilled resources with world class resources and skill sets. It is also stated to have consistently helped the clients to cut down design and development costs of civil, structural, mechanical and plant design by 30-40% and delivered technologically superior outputs to match and exceed expectations. It is claimed to have in-house software development team, quality control training and trouble shooting facilities. M/s Mold-Tek is also rendering web design and development services with experience in turning them into an effective graphic design representation and creating dynamic and graphic rich web applications from IT specs, design prints etc. Keeping in view this information available in the annual report of Mold-Tek as well on its website, we are of the view that the said company is mainly involved in providing high-end services to its clients involving higher special knowledge and domain expertise in the field and the same cannot be taken as comparable to the assessee company which is mainly involved in providing low-end services. It may be pertinent to note here that the financial year 2007-08 was a unique year for Mold-Tek Technologies Ltd. as the scheme of arrangement involving amalgamation between Tekmen

Tool Pvt. Ltd. and Mold-Tek Technologies Ltd. and de-merger between Mold-Tek Technologies Ltd. simultaneously was sanctioned by the Hon'ble AP High Court by 15th July, 2008 with the appointed date for amalgamation and de-merger being 1st October, 2007 and 1st April, 2007 respectively. It is also pertinent to note that while working out the operating margin of the said company, provision for derivative loss of Rs. 6.43 crores made by Mold-Tek technologies Ltd. was excluded by the A.O. treating the same as non-operating expenses whereas in the case of Rushabh Diamonds (supra), it was held by the Division Bench of this Tribunal that the gain or loss arising from the forward contract entered into for the purpose of foreign currency exposure on the export and import has to be taken into consideration while computing the operating profit.

82. In so far as M/s eClerx Services Limited is concerned, the relevant information is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets-financial services and retail and manufacturing. It is claimed to be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals - financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data

aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality. Keeping in view the nature of services rendered by M/s eClerx Services Pvt. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns.

83. For the reasons given above, we are of the view that if the functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Pvt. Ltd. and Mold-Tec Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparables for the purpose of determining ALP of the transactions of the assessee company with its AEs. We, therefore, direct that these two entities be excluded from the list of 10 comparables finally taken by the AO/TPO as per the direction of the DRP.

In our view, the assessee is providing highly skilled services which is technical in nature with inputs engineering and architect applications, therefore, in our view, the assessee cannot be said to be merely BPO and, therefore, the TPO and DRP were right in treating the Mold-Tek and Eclerx Services Ltd. as comparable with that of the assessee's profile .

18. however the co-ordinate Bench in the matter of Tesco Hindustan Service Centre Pvt. Ltd., in ITA No.1285/Bang/2011 dated 9.12.2016 has examined the above comparables Eclerx and Mold-Tek in paragraph 39-40 and 57 and has held that on account of abnormal profits on these two companies and on account of the Mold-Tek failing0 employee cost filter, these 2 comparables cannot be comparable with comparable. The coordinate bench held as under

39. Having carefully examined the orders of lower authorities in the light of Tribunal's finding in the case of Stream International Services (P) Ltd. (supra), we find that the profile of this company was examined by the Tribunal in this case and following the order of the Special Bench of the Tribunal in the case of Maersk Global Centres (India) (P.) Ltd. (supra), the Tribunal held this company to be non-comparable. For the sake of reference, we extract the relevant portion of the order of the Tribunal:—

"(xi) Eclerx Services Ltd. & Mold-Tek Technologies Ltd.:-

For both these companies, the Id. Counsel for the assessee stated that these companies are functionally different, therefore, cannot be considered as comparables. We find that the Mumbai Special Bench of the Tribunal in the case of Maersk Global Centres (India) Pvt. Ltd. in ITA No. 7466/Mum/2012 has rejected eClerx Services Limited because solutions offered by this company included data analytics, operations, management, audits and reconciliation, metrics management and reporting services. The Special Bench opined that if these functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Limited and Mold-

Tek Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparable for the purpose of determining ALP of the transactions of the assessee company with its AEs. Facts being identical, respectfully following the observations of the Special Bench (supra), we direct that these two entities be excluded from the list of final comparables."

40. Since the Tribunal has examined this issue under similar set of facts, we find no reason to take a contrary view. Accordingly following the order of the Tribunal in the case of Stream International Services (P) Ltd. (supra), we hold that this company is not a good comparable and direct the AO/TPO to exclude it from the list of comparables.

.....

57. Mold-Tek Technologies Ltd. : In this regard, the ld. counsel for the assessee has contended that this company's function is dissimilar, therefore it should be excluded from the list of comparables. The ld. counsel further contended that in this case the employee cost is 7.6% of sales, therefore this company can also be excluded by applying employee cost filter as the benchmark fixed by the TPO is at 25%. Moreover, it has abnormal growth of 204% in sales over the previous year. Therefore, for these reasons, the company should be excluded from the list of comparables. He also placed reliance upon the order of the Tribunal in the case of Stream International Services (P) Ltd. (supra) in which the Tribunal following the order of the Mumbai Special Bench in the case of Maersk Global Centres (India) (P.) Ltd. (supra), directed the exclusion of this company. The relevant observations of the Tribunal have already been recorded in the foregoing paragraphs while dealing with the comparable Eclerx Services Ltd. Therefore, we find no justification to reproduce the same again. We, therefore, following the order of the Tribunal, direct the AO/TPO to exclude this comparable from the list of final comparables.

19 In view thereof respectfully following the judgment of co-ordinate bench in the matter of Tesco Hindustan Service Centre

Pvt. Ltd., (Supra), we hold that these 2 companies are not a good comparable and we direct the AO/TPO to exclude it from the list of comparables.”

23. Respectfully following the judgment of the Tribunal in the case of the assessee for the asst. year 2007-08, we dismiss the ground of the Revenue in this regard. Accordingly ground No. 3 is dismissed.

24. Ground No.4 and 5 are regarding rejection of Genesys International Corporation Ltd. as comparable by the CIT(A) without appreciating the fact of functionally dissimilarity

25. In this regard, the CIT(A) deals with the issue of Geneys in para 124 to 128 held as under:-

“”124. The appellant has pointed out that M/s Genesys International Corporation Ltd. was functionally different, as it was mainly engaged in the area of Geographical Information System (GIS) Services. As per information

collated under section 133(6), the company provided high-end GIS services which included the generation, processing, management, and maintenance of data for GIS and other information management systems and all other services necessary for successful geospatial data implementation. The GIS services performed by Genesys was functionally different from those performed by the appellant under ITES and were more value added and high-end in nature than the routine IT enabled services functions being performed by the appellant.

125. In its response to the notice under section 133(6), Genesys had stated that the company operated in the area of GIS services to companies which were directly or indirectly working in verticals like telecom, energy, public utility, etc. GIS services provided by the company included data conversion, migration, and maintenance, application development, photogrammetry, and outsourcing services. Further, during the year 2007-08, Genesys had earned supernormal growth of 145.92% in total income and 605.43% in profit after tax. In view of this, Genesys could not be considered as an appropriate comparable company.

126. *The Hyderabad bench of the hon'ble ITAT has held in the case of Capital IQ Information Systems (India) Pvt. Ltd. (ITA No. 1961/Hyd/2011) that extraordinary events like merger and de-merger impact profitability in the financial year in which such events take place and these companies cannot therefore be treated as comparables and if it is found that amalgamation has in fact taken place, then the comparable has to be excluded.*

127. *I am inclined to agree with the appellant that Genesys cannot be selected as a comparable to the appellant for being functionally different and in view of its abnormal results during the relevant FY. The hon'ble Pune Tribunal in the case of E-Gain Communication Pvt Ltd ([2008]1118 TTJ 354) while deciding the arm's length nature of the tax payer, who is a contract service provider similar to that of the Appellant, has disregarded oversized/ extraordinary profit earning companies as comparables. Further, the hon'ble jurisdictional Delhi Tribunal in the case of Adobe Systems India Private Limited vs Additional Commissioner of Income Tax, Noida Range LITA No. 5043/Del/20101 has also acknowledged exclusion of companies with supernormal profits.*

128. *Although I have held that it is not necessary for the TPO to go into the horizontal and vertical sub-segments within the same segment, provision of Geographical Information System services like photogrammetry to utility companies is too conspicuous a difference in functionality to be ignored. Notes to accounts in the company's annual report for FY 2007-08 mention that there was a 145.92% growth in the company's income from Rs.1932.65 lakh in 2006-07 to Rs. 4752.81 lakh in 2007-08 and that profit after tax has risen by 605.43% from Rs. 206.38 lakh in 2006-07 to Rs. 1455.87 lakh in 20C--08. This is undoubtedly abnormal and cannot be reflective of the industry trend. Considering these facts, I accept the appellant's submissions and direct the AO to delete this company from the final set of comparables."*

26. On the basis of the above, it was submitted that Genesys International Corporation Ltd. has wrongly been excluded by the CIT(A) from the final list of comparable despite the fact that the said company is functionally comparable with that of the assessee.

27. On the other hand, the assessee relied upon the order passed in Symphony Marketing Solutions India Pvt. Ltd., Flextronics Technologies (India) Pvt. Ltd and M/s Amba Research (India) Pvt. Ltd. to say that the Genesys International Corporation Ltd., is dissimilar to the assessee, therefore, it is required to be excluded.

28. We have heard the rival contentions and perused the records. In the case of the assessee for the asst. year 2007-08, we have dealt with the profile of the assessee herein above.

29. Since this aspect has not been examined by the TPO/CIT(A) while deleting the Genesys International Corporation Ltd., we deem it appropriate to remand the matter back to the file of the CIT(A) with the direction to compare the profile of the assessee with that of the Genesys International Corporation Ltd., based on various documents/agreements entered by the assessee with its AE and the work done, technology used etc. by the assessee for the purpose of rendering the work to AE.

30. In the light of the above, this issue is allowed for statistical purposes.

31. Ground Nos.6, 7 and 8 are regarding exclusion of telecommunication expenses from the total turnover also while computing the deduction u/s 10A of the IT Act.

32. The case of the Revenue is that the telecommunication expenses should be excluded from the export turnover but should not be excluded from total turnover. On this issue, the judgment of Hon'ble Karnataka High Court rendered in the case of Tata Elxsi, 349 ITR 98 supports the case of the assessee because in this case, it was held by Hon'ble Karnataka High Court that the total turnover is sum total of export turnover and domestic turnover and, therefore, if an amount is excluded from export turnover, the total turnover is also reduced by the same amount as a consequences of deduction from export turnover. In this view of the matter, we find no infirmity in the order of the learned CIT(A) on this issue. Regarding the contention of the Revenue that the

Revenue has not accepted the judgment of Hon'ble Karnataka High Court and has filed appeal before the Hon'ble Apex Court, we would like to observe that it is not the case of the Revenue that the judgment of Hon'ble Karnataka High Court has been stayed by Hon'ble Apex Court, and therefore, the judgment is valid and we are bound to follow the same. Accordingly ground Nos. 4 and 5 of the Revenue are rejected.

33. In the result, the appeals filed by the Revenue and the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on **28th April, 2017.**

Sd/-
(A.K GARODIA)
ACCOUNTANT MEMBER

Bangalore

Dated : 28/4/2017

Vms

Copy to :1. The Assessee
2. The Revenue
3.The CIT concerned.
4.The CIT(A) concerned.
5.DR
6.GF

Sd/-
(LALIET KUMAR)
JUDICIAL MEMBER

By order

Asst. Registrar, ITAT, Bangalore.