

**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.987/Bang/2011  
(Asst. Year – 2007-08)

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 : 28-04-2017

**ORDER**

**PER LALIET KUMAR, JUDICIAL MEMBER**

This appeal by the assessee is directed against the order passed by the Dy. Commissioner of Income-tax dated 6.9.2011 pursuant to the direction of DRP dated 16.8.2011 for the assessment year 2007-08.

## 2. The grounds of appeal raised by the assessee are as under:-

The grounds mentioned herein below are without prejudice to one another.

- 1 That the order of the Ld. AO, pursuant to the directions given by the Hon'ble DRP, to the extent prejudicial to the Appellant, is perverse, erroneous on facts and bad in law and has been passed in violation of the principles of natural justice.
- 2.1 That the Ld. AO/DRP erred in reducing the leased line expenses of Rs. 14,48,76,419 from Export turnover while computing the deduction under section 10A of the Act.
- 2.2 That the Ld. AO/DRP erred in reducing freight expenses of Rs. 1,33,528 from Export turnover whilst computing the deduction under section 10B of the Act.
- 2.3 That the Ld. AO/DRP erred in ignoring the fact that the exports of goods made by the Appellant are on 'Free on Board' ('FOB') basis and hence the value of export sales does not include any freight charges in connection with the exports of goods outside India.
- 2.4 Without prejudice to the above, even assuming but not admitting that the above leased line expenses and freight expenses are to be reduced from Export turnover, the Ld. AO/DRP erred in not reducing the said expenses from the Total turnover as well.
- 3.1 That the Ld. AO/DRP erred in disallowing the expenditure of Rs. 9,70,000 under section 14A read with Rule 8D of Income- tax Rules, 1962 ('Rules') holding that expenditure is attributable to earning of exempt income (dividend).
- 3.2 That the Ld. AO/DRP erred in proposing to apply the provisions of Rule 8D of the Rules for the year under consideration.
- 3.3 Without prejudice to the above, even assuming but not admitting that the aforesaid expenditure should be added back to the income of the undertaking eligible for deduction under section 10A of the Act, the Ld. AO/DRP erred in not considering the tax holiday on the amount of such disallowance.
4. That the Ld. AO/DRP erred in upholding the rejection of Transfer Pricing (TP) documentation by the learned Addl Commissioner of Income - tax (Transfer Pricing) - I ('Transfer Pricing Officer' or 'TPO').
5. That the Ld. AO/DRP erred in confirming the action of the learned TPO in ignoring the fact that since the Appellant is availing tax holiday under section 10A of the Act, there is no intention to shift the profit base out of India.
6. That the Ld. AO/DRP erred both in facts and law in confirming the action of the learned TPO of making an adjustment to the transfer price of the Appellant in respect of its Consumer Finance Division by Rs. 152,450,673 holding that the international transactions do not satisfy the arm's length principle envisaged under the Act and in doing so grossly erred in:
  - 6.1 Upholding the act of the learned TPO in including companies in the comparability analysis which do not satisfy the test of comparability.
  - 6.2 Upholding the act of the learned TPO in rejecting companies similar to the Appellant while performing the comparability analysis.
  - 6.3 Upholding the act of the learned TPO of collecting information of the companies by exercising power granted to him under section 133(6) of the Act.
  - 6.4 Disregarding application of prior year data as used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year 2006-07) data for comparable companies should be used.
  - 6.5 Ignoring the limited risk nature of the services provided by the Appellant as detailed in the TP documentation and in upholding the conclusion of the learned TPO that no adjustment on account of risk differential is required while determining the Arm's Length Price of the international transactions of the Appellant, but for an adjustment towards differences in the working capital position between the Appellant and the entrepreneurial comparable companies.

6.6. Concluding that the amended proviso to section 92C(2) of the Act under Finance (No 2) Act, 2009, would be applicable for Assessment Year 2007-08 and in not appreciating that even if the arms' length price falls outside the 5% tolerance band the adjustment would have to be reckoned after allowing the benefit of +/- 5% variation as provided in proviso to Section 92C(2) of the Act, while determining the arms' length price.

7. That the Ld. AO erred in consequently levying interest under section 234B, section 234C and section 234D of the Act to the extent of Rs. 3,13,38,684, Rs. 2,62,989 and Rs. 71,113 respectively.

All the aforesaid grounds are without prejudice to one another. The Appellant craves leave to alter, amend, modify, amplify or withdraw any or all the above grounds of objection, or add any further grounds, before or at the time of hearing.

3. Ground No.1 is general.

4. Ground No.2.1 to 2.4 is with regard to reduction in deduction u/s 10A and 10B. The DRP at page No.48 of the order records as under:-

**Panel-**The assessee has presented its arguments at great length on page number 6 to 15 in exhibit B to firm 35-A. the assessee has relied on catena of court decisions in support of its arguments. In the draft order dated 30.11.2010 passed u/s 143 (3) r.w.s. 144C of the Act the AO has discussed the issues related to deduction U/s 10A & 10B in paragraph 4 to 6 on page 3 to 11 of the Income Tax Act 1961. We have read what the AO and the assessee have submitted in this regard. After careful consideration of the reasons given by the AO for restricting deduction U/s 10 A and 10B of the Act and arguments given by the assessee against such deduction, we have reached to the conclusion that there is no flaw in the approach of the AO. Further, the issues involved in 10A & 10B deduction have not reached to their finality as department has filed appeal in this matter. Therefore, no relief is provided by us to the assessee on this count.

5. On the other hand, the learned DR relied on the order passed by the authorities below.

6. We have heard the parties and perused the record. This issue is covered by the decision of coordinate bench of the tribunal in the assessee's own case in ITA No.185,186 and 187/Bang/2010 for the assessment year 2002-03, 2003-04 and 2004-05, wherein it was held that if freight expenses are not included in export turnover and total turnover, then they cannot be reduced while computing the deduction u/s 10B of the Act. In our view this issue is no more *res integra* and it is covered by the decision of Hon'ble Jurisdictional High Court in 349 ITR 98. Therefore, the grounds raised are required to be allowed and accordingly we allow the grounds of the assessee on the similar lines as held by the coordinate bench in the assessee's own case. Accordingly, ground Nos.2 to 2.4 of the assessee's appeal is allowed.

7. Ground Nos.3 to 3.3 is with regard to disallowance u/s 14A of the Act, ground Nos.3.1 and 3.2 are as under:

- 3.1. *Ground 3.1: That the Ld. AO/DRP erred in disallowing the expenditure of INR 9,70,000 under Section 14A read with Rule 8D of Income-tax Rules, 1962 ("Rules") holding that expenditure is attributable to earning of exempt income (dividend)*
- 3.2. *Ground 3.2: That the Ld. AO/DRP erred in proposing to apply the provisions of Rule 8D of the Rules for the year under consideration.*

8. The Id Authorized Representative on behalf of the assessee has submitted that during AY 2007-08, the assessee had earned dividend

income of INR 1,95,74,334. The said dividend income has been earned on the investment of INR 38,80,00,000 made by the Appellant's Hyderabad India Innovation Centre ("IIC") division out of its own funds in the cumulative redeemable preference shares of GE India Industrial Private Limited. The Appellant had not incurred any expenditure in earning such dividend income. The fact that the Company has not incurred any expenditure in relation to earning dividend income has also been disclosed in the tax audit report for the year under consideration. The Company at the time of assessment proceedings has made a detailed submission in this regard wherein the Company has submitted to the learned AO that since no expenditure was incurred by the Company in earning the dividend income, no disallowance shall be made by the Company under Section 14A of the Act. The learned AO without recording any reasons of not being satisfied with the explanations offered by the Company and without identifying any proximate cause of any expenditure incurred in connection of earning the exempt income, has arbitrarily applied Rule 8D(2)(iii) of the Rules and made a disallowance of INR 9,70,000/- under Section 14A of the Act. The Appellant further submitted that Rule 8D of the Rules was inserted vide Notification No. S.O. 547(E) dated 24 March 2008. During the course of assessment proceedings, the assessee contended before the learned AO/DRP that Rule 8D of

the Rules was applicable only prospectively i.e., from AY 2008-09 onwards and hence could not be applied to the case of the Company for the year under consideration (i.e. AY 2007-08). The learned AO in the final assessment order has erroneously computed disallowance under Section 14A of the Act by applying Rule 8D(2)(iii) of the Rules without appreciating the fact that the said Rule is not applicable for AY 2007-08. Accordingly, the Appellant humbly submits that it is a well settled position of law that application of Rule 8D of the Rules is prospective from AY 2008-09 onwards and it does not have retrospective application.

9. The learned DR relies upon the order passed by the AO more particularly page 62 of the AO's order whereby the AO invoked the provision of sec. 14A r.w.r 8D of the Act.

10. We have heard the rival contention and perused the record. The Bombay High in the case of Godrej and Boyce Mfg. Co. Ltd., Vs. DCIT [2010] 194 Taxman 203 has held that Rule 8D is prospective in nature and is not retrospective in nature and is only applicable from asst. year 2008-09 onwards. Therefore, in our view, Rule 8D cannot be invoked by the AO for calculating disallowance u/s 14A. In the

case of Godrej and Boyce Mfg. Co. Ltd., (Supra) at para 67 it is held as under:-

*67. Even in the absence of sub-sections (2) and (3) of section 14A and of rule 8D, the Assessing Officer was not precluded from making apportionment. Such an apportionment would have to be made in order to give effect to the substantive provisions of sub-section (1) of section 14A which provide that no deduction would be allowed in respect of expenditure incurred in relation to income which does not form part of the total income under the Act. Consequently, de hors the provisions of sub-sections (2) and (3) of section 14A and rule 8D, the Assessing Officer was entitled to determine by the application of a reasonable method what quantum of the expenditure incurred by the assessee would have to be disallowed on the ground that it was incurred in relation to the earning of income which does not form part of the total income under the Act. Undoubtedly, in determining what would constitute a reasonable method for effecting the disallowance, the Assessing Officer would have to give due regard to all the facts and circumstances of the case. The change which is brought about by the insertion of sub-sections (2) and (3) into section 14A by the Finance Act of 2006 with effect from 1-4-2007 is that in a situation where the Assessing Officer is not satisfied with the correctness of the claim of the assessee in regard to the expenditure incurred by it in relation to the non-*

*taxable income, the Assessing Officer would have to follow the method which is prescribed by the Rules. The Rules were notified to come into force on 24-3-2008. It is a trite principle of law that the law which would apply to an assessment year is the law prevailing on the first day of April. Consequently, rule 8D which has been notified on 24-3-2008 would apply with effect from assessment year 2008-09. The rule, consequently cannot have application in respect of assessment year 2002-03 which is the year under consideration in this case.*

11. Respectfully following the decision of Godrej and Boyce Mfg. Co. Ltd., (Supra), we set aside this issue to the file of the AO for computing reasonable expenditure incurred in relation to income which does not form part of the total income

12. Ground No.4 is general in nature. Ground No.5 is not pressed.

13. Ground No.6 is with respect to TP issue.

13.1 The learned Assessing Officer (“AO”) obtained the approval of Commissioner of Income-tax, Bangalore and made a reference u/s 92CA(1) of the Act to the Additional Commissioner of Income Tax, (Transfer Pricing) - I, (“TPO”) for determination of Arm’s Length

Price (“ALP”) of the international transactions entered by the Appellant with its AEs.

13.2 A notice was issued by the learned TPO calling for certain details such as profit & loss account, balance sheet, statement of income filed with the return of income, transfer pricing documents maintained, agreements entered into between the Appellant and its associated enterprises for the AY 2007-08. In response, the Appellant furnished the required details. Subsequently, the learned TPO issued show-cause notice dated 31 May 2010 and in response to that assessee filed submissions before the TPO on 12<sup>th</sup> July 2010 and 8<sup>th</sup> September 2010.

31.3 The TPO passed an order dated 27 October 2010 under Section 92CA of the Act making an adjustment of INR 152,450,673 to the international transaction of ITES entered by the Appellant with the AEs.

13.4 The international transaction of the Appellant with its AE during the captioned AY is as under:

<b>S.NO</b>	<b>Nature of International Transaction</b>	<b>Amount in INR</b>
1.	Provision of customer support service (ITES)	158,08,98,347
2.	Provision of software services	275,63,51,266
3.	Provision of personnel sourcing services	25,289,189
4.	Purchase of fixed assets	7,072,770
5.	Recovery of expenses	1,241,646
6.	Purchase of components	135,527
7.	Export of finished goods	3,483,883
8.	Reimbursement of expenses	137,879,045

13.5 The TPO selected the following companies as comparable:

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Sl. No.	Company name	Net margin as per TP order
1	Accentia Technologies Limited (seg)	30.61%
2	Bodhtree Consulting Limited (seg)	29.58%
3	Eclerx Services Limited	89.33%
4	HCL Comnet Systems & services Limited (seg)	44.99%
5	Informed Technologies India Limited	35.56%
6	Mold Tek Technologies Limited(Seg)	113.49%
7	Vishal Information Techologies Limited	51.19%
8	Infosys BPO Limited	28.78%
9	Wipro Limited (seg)	29.70%
10	Accurate Data Converters	50.68%
11	Aditya Birla Mincas Worldwide Limited (Formerly known as Transworks Information Services Ltd.)	11.98%
12	Allsec Technologies Limited	27.31%
13	Apex Knowledge Solutions Pvt Limited	12.83%
14	Apollo Healthstreet Limited	-13.55%
15	Asit C Mehta Financial services Limited	24.21%
16	Caliber Point Business Solutions Limited	21.26%
17	Cosmic Global Limited	12.40%
18	Datamatics Financial Services Limited (seg)	5.07%
19	Flextronics Software systems Limited (seg)	8.62%
20	Gensys International corporation Limited	13.35%
21	ICRA Techno Analytics Limited (seg)	12.24%
22	iServices India Private Limited	49.47%
23	Maple Esolutions Limited	34.05%
24	R Systems International Limited (Seg)	20.18%
25	Spanco Limited (Seg)	25.81%
26	Triton Corp Limited	34.93%
27	Nittany Outsourcing Services pvt Limited	11.50%
<b>Average</b>		<b>30.21%</b>
<b>Working capital adjustment</b>		<b>3.10%</b>
<b>Adjusted operating margin</b>		<b>27.10%</b>

13.6 Based on the above approach, the learned TPO made an adjustment of INR 15,24,50,673 in respect of the ITES segment.

13.7 Being aggrieved by above mentioned adjustments made in the draft assessment order by the learned AO, the assessee filed objections before the Hon'ble Dispute Resolution Panel ("DRP") on 31 December 2010. The DRP vide direction dated 16 August 2011 has upheld the draft assessment order in entirety. Accordingly, the Learned AO has passed the final assessment order dated 6 September 2011 ("the Order"), in conformity with the directions given by DRP.

13.8 Accordingly, being aggrieved by the Order, the assessee is before us on the above stated TP grounds .

13.9 The Appellant has filed the following modified grounds of appeal to plead rejection of specific companies which are considered as comparable by the TPO and upheld by DRP.

*"8. The learned TPO / AO has failed to appreciate the fact that the following companies are not functionally comparable to the Appellant, therefore has erred in law and facts in considering them as comparable companies:*

- a) Mold-Tek Technologies Limited;*
- b) eClerx Services Limited;*
- c) Vishal Information Technologies Limited;*
- d) Infosys BPO Limited;*

- e) *Accentia Technologies Limited;*
- f) *Bodhtree Consulting Limited;*
- e) *Accurate Data Converters Private Limited;*
- f) *iServices India Private Limited*

9. *Without prejudice to the transfer pricing documentation maintained by the Appellant, the learned TPO / AO has failed to appreciate the fact that Wipro Limited is not functionally comparable to the Appellant, therefore has erred in law and facts in considering it as a comparable company.”*

13.10 However during the course of argument the appellant has restricted his argument in respect of companies mentioned at S.Nos. 6, 7, 8 and 9 of the Chart. Hence, we shall only be examining the comparability of these 4 companies only.

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

13.11 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 paperback):

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 can not said to un-comparable with the assessee company merely on the ground that that decision were rendered in the some other matter. It was submitted that TP study 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 We have heard the rival contentions of the parties and perused the record. 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 AWork 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 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 . 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 functionally comparable with that of the assessee's profile.

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.

18. 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 failing<sup>0</sup> 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 Id. counsel for the assessee has contended that this company's function is dissimilar, therefore it should be excluded from the list of comparables. The Id. 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.

**Vishal Information Technologies Ltd. And Infosys BPO,**

20. The assessee has submitted that these companies are not comparable with the assessee as the profile of the company is different. In the written submissions filed by the assessee, it is mentioned as under

6.1.9. Vishal has a different business model as compared to the business model of the Appellant. Vishal sub-contracts majority

of its ITES works to third party vendors. As per the annual report of the company for FY 2006-07, the company had incurred employee cost of INR 70,27,631 which is 2.3% of the revenue earned by the company during the year. Further, about 43% of the revenue is expended towards payment to vendors.

SCHEDULE 16 - PERSONNEL COST		
Salaries, bonus etc	6686729	3158200
Staff welfare	307666	20660
Contribution to provident and other funds	33237	22896
	<u>7027631</u>	<u>3201756</u>

6.1.10. It is evident from the above that Vishal has adopted a very different business model by outsourcing the services to third party vendors. Accordingly, Vishal is providing agency services by acting as an intermediary between the final customer and the vendor. These intermediary services

6.1.11. In support of the above contentions, the Appellant would like to highlight the following judicial pronouncements:

- 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] **(page 1631, 1632)**
- M/s Ariba Technologies India Pvt. Ltd. Vs ITO, [IT(TP)A No.441/Bang/2012] **(page 1591 to 1595)**
- M/s. Capital IQ Information systems (India ) Pvt. Ltd. (ITA No.1961/Hyd/2011) **(page 1800 to 1802)**

6.1.12. The Appellant submits that Infosys is an established player in the BPO industry. It should be rejected on account of the fact that it is a market leader and also on the difference in risks assumed. The company has tremendous brand value attached to it which has a significant impact on its pricing in the market and consequently on the margins earned. Also, the company has incurred huge selling and marketing cost and this has been increasing on a year on year basis.

6.1.13. Further, Infosys is functionally dis-similar to the Appellant as Infosys provides end to end solutions in technical consultancy, design, development, re-engineering, maintenance, system integration and implementation.

6.1.14. The relevant extracts from the annual report of Infosys for FY 2006-07 are provided below:

Page 6 (Refer Page 913 of the paper book):

a. **Business Overview**

Your company delivers end-to-end voice, data, and knowledge process outsourcing and help customers transform their businesses by enabling them to do their work better, faster, cheaper, and differently. Business units are

6.1.15. In support of the above contentions, the Appellant would like to highlight the following judicial pronouncements:

- Societe Generale Global Solution Centre Pvt. Ltd.[IT(TP)A No.1188/Bang/2011] dated 22 Apr 2016 **(page 1516, 1517)**
- 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] **(page 1627)**
- M/s Ariba Technologies India Pvt. Ltd. Vs ITO, [IT(TP)A No.441/Bang/2012] **(page 1583 to 1588)**

6.1.16. In light of the above, the Assessee submits that Infosys BPO should not be considered as comparable

21. The Id DR relied upon the order passed by the authorities below.

22. We have gone through the order passed by the coordinate bench in the matter of Pole to Win India Pvt. Ltd., and other judgment. In our view, the comparability of these companies have been examined by this Tribunal and it was found that Vishal Information Technologies Ltd., was into outsourcing, therefore, it cannot be comparable with that of the assessee. Moreover, the business model of the comparable company viz., Vishal Information Technologies Ltd. is different from the assessee as it is getting its work done through outsourcing. Similarly, Tribunal has excluded the Infosys

BPO Ltd. from the list of comparables after examining the comparability and size of the Infosys BPO in the judgment referred herein above. Therefore, respectfully following the decision of the coordinate Bench cited herein above, we direct the AO/TPO to exclude these two companies i.e. **Vishal Information Technologies Ltd. And Infosys BPO** from the list of comparables.

23. In the result, the appeal of the assessee is party allowed.

Order pronounced in the open court on **24th April , 2017.**

**Sd/-**  
**(A.K GARODIA)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(LALIET KUMAR)**  
**JUDICIAL 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

By order

Asst. Registrar, ITAT, Bangalore.