IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-2' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 2066/DEL/2015
[A.Y 2010-11]

GE Capital Services India 401& 402, 4th Floor, Aggarwal Millennium Tower, E-1, 2, 3 Netaji Subhash Place, Pitampura, New Delhi	Vs.	The Dy. C.I.T Circle - 10(1) New Delhi
PAN: AAACG 0239 L		
[Appellant]		[Respondent]

Assessee by : Shri Sachit Jolly, Adv
Shri Aarush Bhatia, Adv

Revenue by : Shri H.K. Choudhary, CIT-DR

Date of Hearing : 07.05.2019
Date of Pronouncement : 14.05.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 30.01.2015 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short].

2. Substantive grievances of the assessee can be summarised as under:

a) Disallowance u/s 14A of the Act - Rs. 7.94 crores;

b) Disallowance of Rs. 1,03,87,99,712/- on account of loss on sale of finance receivables;

c) Addition of Rs. 12,31,46,625/- made by the TPO in respect of Regional Headquarter Services availed by the assessee from its Associated Enterprises [AEs].;

d) Addition of Rs. 43.79 lakhs as notional interest on overdue receivables from its AEs.

3. Other grievances of the assessee relates to not granting TDS credit and withdrawing interest u/s 244A of the Act and levying interest u/s 234D of the Act.

BUSINESS PROFILE OF THE ASSESSEE

*"M/s. GE Capital Services India (GECS1) is a company incorporated in India. GECSI is **98.73%** owned by GE Capital*

Services (Mauritius) Ltd.. 0.635% owned by Genera! Electric Capital Services India Holding Inc. and 0.635% owned by General Electric Capital Services Indian Investments, LLC. GE ultimately owns all these companies.

GECS was incorporated in India in October 22, 1993 as an NBFC with the primary objective of participating in the development of India's financial services markets as well as in infrastructure and industrial growth. It obtained approval of the Foreign Investment Promotion Board (FIPB) on July 6, 1993 to carry out the following activities:

- *To operate in the sphere of project finance, especially in the power sector, industrial and equipment leasing and financing, export and trade finance, consumer finance and corporate finance;*
- *Taking any special deposits through financial institutions but not offering checking deposit/saving deposit facilities as in the case of a bank.*

2.1 The company has its head office in New Delhi. It also has 16 other regional offices/branches spread in other parts of the country. GECSI has been delivering financial solutions and offers a range of products and services that meet the diverse needs of corporate and retail customers.

3, Details of international transactions:

The transactions entered into by the taxpayer with its AEs during the year under consideration are as follows;

Nature of transaction	Method used by Assessee	Value of transaction (In 1NR)
Provision of Support Services	TNMM	198,62,662
Availing of Headquarter Services	TNMM	12,31.46,625
Interest on External Commercial	CUP	14,63,62,660
Sharing of personnel costs	CUP	3,29,70,159
Contribution under employees share	-	4,70,952

GROUND NO. 1

4. During the course of assessment proceedings and on perusal of the Profit and Loss Account and Balance Sheet, the Assessing Officer observed that the assessee company has made investment in shares at Rs. 1,29,34,57,000/- for the purpose of earning dividend income and long term capital gains which are exempt and not chargeable to tax under the Act. The assessee was asked to explain as to why the disallowance u/s 14A r.w.r 8D of the ITAT Rules may not be computed on the entire investment.

5. In its reply, the assessee explained that it has made investment out of its own funds and no interest bearing funds have been invested to earn tax free income. The assessee pointed out that it has claimed only Rs. 78,037/- as exempt income.

6. The Assessing Officer was not satisfied with the reply of the assessee and computed the disallowance as per Rule 8D of the Rules at Rs. 7,94,78,896/-.

7. The assessee raised objections before the DRP and vehemently contended that the Assessing Officer has not recorded any satisfaction which is mandatory as per provisions of section 14A of the Act. It was also pointed out that the assessee has suo moto disallowed Rs. 25,819/- u/s 14A of he Act being expenses pertaining to tax free income. It was strongly urged that the assessee has not incurred any expenditure for earning dividend income of Rs. 78,037/-.

8. After considering the facts and detailed submissions, the DRP observed that even if no expenditure is incurred in relation to the average investments, then also it cannot be ruled out that the assessee has not incurred any expenditure directly or indirectly on

upkeep/updated/maintain/look after the investments. The DRP further observed that admission of the assessee for disallowance of Rs. 25,819/- u/s 14A r.w.r 8D justifies the Assessing Officer's action in principle. The DRP declined to interfere with the findings of the Assessing Officer regarding disallowance u/s 14A of the Act. However, the DRP directed the Assessing Officer to record specific satisfaction of incorrectness of the working of the assessee for making disallowance u/s 14A of the Act while issuing the final order.

9. Pursuant to the directions of the DRP, the Assessing Officer simply made addition of Rs. 7,94,53,077/- after reducing the suo moto disallowance by the assessee of Rs. 25,817/-.

10. Before us, the ld. DR strongly supported the findings of the AO. The ld. AR vehemently submitted that firstly, the DRP grossly erred in directing the Assessing Officer to record satisfaction and secondly, inspite of this direction, the Assessing Officer simply made the addition without going into the merits of the case. It is the say of the ld. AR that there is no dispute that the assessee has not incurred any expenditure in relation to earning of exempt dividend income of Rs.

78,037/-. The ld. AR concluded by saying that at the most, the disallowance should be restricted to the exempt income.

11. The ld. DR strongly supported the findings of the lower authorities.

12. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below We find that the assessee has suo moto disallowed Rs. 25,817/- u/s 14A of the Act for earning tax free dividend income of Rs. 78,037/-. It is also not in dispute that the Assessing Officer has not recorded any satisfaction in so far as correctness or otherwise of the suo moto disallowance of Rs. 25,819/- made by the assessee is concerned. There is also no finding that the assessee has used interest bearing funds for making the investment in shares. The Revenue has failed to establish the nexus between the borrowed funds and the investment in shares.

13. Considering the facts in totality in light of no satisfaction being recorded by the Assessing Officer and considering the suo moto disallowance of Rs. 25,817/- qua the dividend income of Rs. 78,037/-, we direct the Assessing Officer to restrict the disallowance to the

extent of exempt income of Rs. 78,037/-. Ground No. 1 is partly allowed.

GROUND NO. 2

14. On perusing the Profit and Loss Account, the Assessing Officer noticed that under the head of various expenditure, the assessee has claimed Rs. 102,95,14,000/- as expenses on account of loss on sale of finance receivables/securitization. The Assessing Officer further noticed that the amalgamated company GECFS has also incurred similar loss of Rs. 92,85,712/-. Thus, the total loss on this account was at Rs. 103,42,07,000/- or Rs. 103.87 crores. The Assessing Officer observed that this loss i due to the fact that the assessee had extended various loan facilities to its customers pursuant to applicable loan agreement

15. During the year, the assessee entered into an assignment agreement with Shriram Transport Finance Company Ltd [STFCL] for outright sale of each of these receivables for an agreed consideration and in terms of the above arrangement, all rights, title and interest with respect to these loan facilities were transferred to STFCL without

any recourse to the assessee. The aggregate book value of loans is at Rs. 10,11,71,94,000/- after adjusting the sale consideration of Rs. 9,08,29,87,000/- received from STFCL and resultant loss at Rs. 103,42,07,000/- has been claimed as expenses in the Profit and Loss Account. The assessee was asked to explain under which section these expenses are allowable as deduction.

16. The reply of the assessee reads as under:

> "In this regard, the assessee submits that, during the subject year, it had sold part of its finance receivables to Shri Ram Transport Finance Company Limited ('STFCL'j. All the rights and liabilities along with the finance receivables were also transferred to STFCL without 'recourse', i.e. in the event of default by the borrower in repaying installments to STFCL, STFCL cannot claim such loss from the assessee. The sale resulted in a loss of Rs. 103.45 crores for GBCSI and Rs0.93 crores in the case of GE Capital Financial Services. This loss has been debited by the assessee in its Profit & Loss account.
>
> In response to the query/ clarification sought by your office regarding the deductibility of the aforesaid loss under the provisions of the Act, the assessee, submits detailed reply as under:

Allowability of Losses under section 28

Chapter TV-D of the Act deals with computation of income under the head 'Profits and gains of business or profession'. Section 28 being the charging section, brings to tax profits and gains of any business carried on by the assessee at any time during the previous year. Further, Section 29 provides that income referred to in Section 28 shall be computed in accordance with provisions of sections 30 to 43D.

Deductions in computing business income are not exhaustive:

The assessee submits that deductions enumerated in chapter IV-D in computing business income are not exhaustive. The charge under section 28(i) is in respect of "Profits and gains'[1]. The term °Profits or Gains* has to be given its natural meaning and the said expression has to be understood in a commercial sense. As a result, expenditure necessitated out of commercial expediency has to be allowed in computing the profits and gains."

17. The Assessing Officer examined the claim of the assessee considering the judicial decisions relied upon by the assessee but was not convinced with the contention of the assessee and observed that the facts of the judicial decisions relied upon by the assessee are different from the facts of the assessee and hence did not take any cognizance of the decisions relied upon by the assessee.

18. The Assessing Officer further examined the facts of the assessee with reference to the agreement entered into with STFCL. The main clauses of this agreement, as considered by the Assessing Officer are reproduced hereunder:

"Article 1

1.1.1 "Actual purchase consideration" shall mean the aggregate consideration payable by the buyer to the seller for the purchase of their respective obligator receivable, which shall be equivalent to the value of the obligator receivable as on the closing date and shall be calculated as follows:

(i) In relation to the obligator from whom amounts are due for a period lesser than 91 (ninety one) calendar days as on the record date.;

a) 87% of the principle outstanding as on the closing date,

b) 87% of the delinquent installment as on the closing date

c) 87% of accrued but unpaid charges including repossession fee as on the closing date

d) 87% of the interest accrued but not due as on the closing date

(ii) In relation to the obligator from whom amount are due for a period greater than or equal to ninety one calendar days as on the record date;

a) 86% of the principle outstanding as on the closing date,

b) 86% of the delinquent installment as on the closing date

c) 86% of the accrued but unpaid charges including repossession fee as on the closing date

d) 86% of the interest accrued but not due as on the closing date

(iii) 100% of the advances received from the obligators as on the closing date, (for avoidance of doubt it is clarified that this advance amount shall be set off against the other amount payable by the buyer and only the difference shall be paid.

1.1.8 "GBCFS Loan Agreement" shall mean the master security and loan agreement entered into between GECFS and the respective GECFS obligators including related loan applications, loan files and under writing document, setting out the terms and conditions for the Rupee loan facility lent and advanced by GECFS to the respective GECFS obligators, for financing the acquisition of construction equipment/ commercial vehicle as the case may be

1.1.16 "GECFS Underlying security" shall mean (i) the security interest of GECFS in the construction equipment or commercial vehicle , securing the loan facility granted by GECFS to the GECFS obligators pursuant to the GECFS loan agreements (ii) the guarantee executed by the surety , if any, to secure the

obligations of the GEFS obligors to GECFS as per the respective GECFS loan agreement; and (iii) all other security rights available to GECFS under the GECFS underlined document.

Article II

2.7 The sellers hereby further acknowledge and agree that except for the specific representation and warranty expressly recorded in this agreement the transfer and assignment of the obligator receivable shall on an "as is where is basis" and that the seller make no other representation or warranty whether expressed or implied for any matter pertaining to the transaction contemplated under this agreement. For avoidance of doubt it is clarified that any representation or warranty including an implied warranty under law or otherwise which is not expressly recorded in this agreement is hereby excluded.

Article IV

4.3.3 Discrepancy in value of the actual purchase consideration

(1) n the event of any discrepancy of different in the value of actual purchase consideration determined by the seller and by the buyer the parties shall within the period of ten calendar days from the date of such notice of discrepancy or difference, mutually appoint a chartered accountant of international repute to reconcile such discrepancy / difference. The parties hereby further agree that for the purposes of determination of the actual purchase consideration, the seller shall give access to the

following information or report to such chartered accountant.

Article VII

7.6 each patty shall use its reasonable effort and to cooperate and cause its employee s to cooperate with and assess the indemnified party or the indemnifying party as the case may be in connection with any third party claim, including attending conferences , discovery proceedings, hearing, trial and appeals and furnishing reports, information and testimony, as may reasonably may requested ; provided, that each patty shall use its reasonable effort, in respect of any third party claim on which it has assumed the defense to preserve the confidentiality of all confidential information and the attorney client and work product privileges.

7.8 Except for the buyer looses arising due to claim under sub clause 5:1.2 for which the seller shall indemnify the buyer up to the outstanding amount of the relevant obligator receivable at the time of such claim , the liability of the each of the seller to the buyer for all buyer losses at any time under this article VII, shall not exceed 20% of their portion of the actual purchase consideration"

19. After examining the aforementioned clauses, the Assessing Officer came to the conclusion that the assessee has not transferred loan facilities in totality. The main reason for coming to this

conclusion is that even after the execution of this agreement, the assessee has entered into an interim service agreement for collection and security agent of the buyer with respect to obligator receivables for a specific period of time. The Assessing Officer was of the opinion that the clause of agreement clearly establishes that even after selling receivables, the assessee company continues to carry on the business activities with respect to these receivables as a collection agent of the buyer company.

20. The Assessing Officer further observed that the assessee failed to furnish any details or explanation as to how much amount was charged for these services and as to how the same is appearing in the books of account. The Assessing Officer further observed that the actual purchase consideration is also not verifiable from records as to how this amount of purchase consideration was determined. The Assessing Officer further pointed out that as per clause 7.8, it has been clearly mentioned that the seller shall indemnify the buyer upto the outstanding amount of relevant obligator receivables at that time of such claim and the liability of such loss at any time shall not exceed 20%, which means that the assessee company has still stake in the

loans sold to the buyer and the expenses @ 13% or 14% is not final and that amount can increase upto 20%.

21. Another observation of the Assessing Officer relates to the transfer of 45000 individual agreements with various debtors without making any endorsement or entry for transfer of individual agreement in the name of the buyer company. It was observed that the loans were given on the security of vehicles, other assets and the vehicles and other machineries were hypothecated in favour of the assessee company. All these facts clearly prove that the transaction on sale of loans has not completed yet and the agreement on basis of which the loss of Rs. 103.45 crores has been claimed is collusive in nature and clearly a colourable device to avoid tax. The Assessing Officer concluded by disallowing Rs. 103,87,99,712/-

22. Objections raised by the assessee did not find any favour with the DRP who confirmed the findings of the Assessing Officer.

23. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on

record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

24. The following issues need consideration in so far as Revenue's stand is concerned:

(i) STFCL has no authority to recover the loan from the borrower as hypothecation is in the name of the assessee.

(ii) Loanees were not informed befo e close of the accounting year.

(iii) Valuation of sale consideration is not properly explained.

(iv) When loan portfolio has been sold by the assessee, then why het purchaser has right to indemnity @ 20%

25. We have given a thoughtful consideration to the orders of the authorities below. However, after going through the relevant documentary evidences, we do not find any force in the contention of the Revenue and we will address each issue one by one as under.

(i) <u>STFCL has no authority to recover the loan from the borrower as hypothecation is in the name of the assessee.</u>

26. There is no dispute that the assessee has lent money to around 45000 borrowers who gave security of vehicles in the form of hypothecation to the assessee. In this line of trade, the lender takes post dated cheques from the borrowers in advance. Since on the date of sale agreement executed with STFCL the assessee was holding post dated cheques of the borrower, therefore, for the period to which post dated cheques were with the assessee, the assessee collected installments for and on behalf of STFCL and after retaining the commission at 1.75%, the assessee remitted the amount to STFCL.

27. For this reason, the assessee acted as collection agent of STFCL. In so far as hypothecation of vehicle is concerned, in our understanding, the vehicles are hypothecated only as security against loan given. Hypothecation of around 45000 vehicles to be transferred in the name of STFCL would take a substantial period of time and moreover, it is for STFCL to get hypothecation transferred in its name, the assessee cannot be held liable after sale of receivables to STFCL.

28. Moreover, we find that the assessee has given a Power of Attorney to STFCL. The Power of Attorney is found to be exhibited at pages 818 to 820 of the paper book. As per clause (c) of this Power of

Attorney, transfer and assignment is absolute and the intent that the buyer shall with effect from date of sale be deemed to be full and absolute owner and as such legally entitled to all such obligor receivables and underlying security and the buyer shall assume all rights, duties and obligations of the seller under the underlying documents as if instead of the seller, [assessee] the buyer STFCL had been a party to such underlying documents.

29. As per clause (d), the seller has agreed to grant in favour of the buyer a Power of Attorney to enable the buyer to give effect to the transactions contemplated under the said deed and to perfect, protect and more fully evidence buyer s title over the obligor receivables under the underlying securities.

30. In the light of the aforementioned facts on record, we are of the opinion that the objections raised by the Assessing Officer/TPO/DR are not acceptable. STFCL has full authority to recover the loans from the borrowers.

(ii) Loanees were not informed before close of the accounting year

31. This contention of the Revenue highlighted by the Revenue before us is also not acceptable for the fact that vide submissions dated 24.01.2014, the assessee has specifically replied to the Assessing Officer that the assessee has issued letters to individual borrowers informing of the fact that their loans have been transferred by the assessee to STFCL. Samples of such letters were also furnished. This reply of the assessee finds place at pages 182 to 184 of the paper book and sample letters are exhibited at page 194 of the paper book.

(iii) Valuation of sale consideration is not properly explained.

32. It appears that the Assessing Officer/DRP has not appreciated the following clauses of the sale agreement in true perspective:

> "Estimated Purchase Consideration" shall mean an estimate determined by the Sellers of the Actual Purchase Consideration, which shall be equivalent to the value of the Obligor Receivables as on the Pre-Closing Valuation Date and shall be calculated as follows:

(i) In relation to the Obligors from whom amounts are due for a period lesser than 91 (ninety-one) calendar days as on the Record Date:

(a) 87% (Eighty-Seven Percent) of the principal outstanding as on the Pre-Closing Valuation Date;

(b) 87% (Eighty-Seven Percent) of the Delinquent installment as on the Pre-Closing Valuation Date;

(c) 87% (Eighty-Seven Percent) of accrued but unpaid charges including repossession fee as on the Pre-Closing Valuation Date; and

(d) 87% (Eighty-Seven Percent) of the interest accrued but not due as on the Pre-Closing Valuation Date.

(ii) In relation to the Obligors from whom amounts are due for a period greater than or equal to 91 (ninety-one) calendar days as on the Record Date:

(a) 86% (Eighty Six Percent) of the principal outstanding as on the Pre-Closing Valuation Date;

(b) 86% (Eighty-Six Percent) of the Delinquent installment as on the Pre-Closing Valuation Date;

(c) 86% (Eighty-Six Percent) of accrued but unpaid charges including repossession fee as on the Pre-Closing Valuation Date; and

(d) 86% (Eighty-Six Percent) of the interest accrued but not due as on the Pre-Closing Valuation Date.

(iii) 100% (hundred percent) of the advances received from the Obligors as on the Pre- Closing Valuation Date. (For avoidance of doubts it is clarified that this advance amount shall be set off against the other amounts payable by the Buyer and only the difference shall be paid.)"

33. It can be seen from the aforesaid clauses that 87% is used for the amounts due for a period lesser than 91 calendar days and 86% is used for the amount due for a period greater than or equal to 91 days. In our considered opinion, there should not be any confusion as observed by the Assessing Officer whether the consideration is 87% or 86% and as to how this amount of purchase consideration was determined.

34. The clause of estimate purchase consideration exhibited hereinabove, clearly explains when 87% is to be considered and when 86% is to be considered.

(iv) <u>When loan portfolio has been sold by the assessee, then why the purchaser has right to indemnity @ 20%</u>

35. The purchase consideration which is determined as per estimated purchase consideration clauses mentioned hereinabove, is subject to

representations and warranties clause at Article V of the agreement which reads as under:

"Except as disclosed by the Sellers, each of the Sellers hereby represent and warrant the following to the Buyer, respectively, as of the Signature Date and the Closing Date:

5.1.1 Organization. Power and Qualification

(i) The Seller is a non-banking financial company, duly organized and validly existing under the laws of India and is qualified and authorized to do and carry on its business;

(ii) The Seller has the full corporate power and authority to enter into this Agreement and exercise its rights and perform and comply with its obligations under this Agreement;

(iii) This Agreement has been validly and duly executed and delivered by the Seller and the executants of this Agreement have been duly empowered and authorized to execute this Agreement;

(iv) This Agreement constitutes a legal, valid and binding obligation of the Seller;

(v) No consent, approval, order, registration or qualification of, or with, any court or regulatory authority or other governmental body having jurisdiction over the Seller, the absence of which would adversely affect the legal and valid

execution, delivery and performance by the Seller of this Agreement or the taking by the Seller of any actions contemplated herein, is required; and

(vi) The execution and delivery of this Agreement and the consummation of the transactions contemplated herein, do not conflict with or result in a breach of or a default under any of the terms, conditions or provisions of any legal restriction (including, without limitation, any judgment, order, injunction, decree or ruling of any court or governmental authority, or any applicable law) and does not violate or result in the violation of the Sel er's Memorandum and Articles of Association..

Obligor Receivables and Underlying Documents

(i) The Seller is the full and absolute legal and beneficial owner of the applicable Obligor Receivables and has a clear and marketable title thereto;

(ii) The Seller has not sold, transferred or assigned or disposed off or agreed to sell, transfer, assign or dispose off any of the applicable Obligor Receivables to any person other than the Buyer and has the full and absolute right to sell, transfer and assign the applicable Obligor Receivables to the Buyer,

(iii) The Obligor Receivables are not subject to any charge, hypothecation or any other encumbrances of any nature whatsoever or any third party interest whatsoever whether by way of sale, transfer, assignment or as security interest;

(iv) The applicable Underlying Documents constitute a legal, valid and binding obligation of the Seiler and to the Knowledge of the Seller, constitute a legal, valid and binding ooigaroo cf the respective Obligors; and

(v) The Seller has not terminated and shall not terminate any of the applicable Underlying Documents, which have been or are to be assigned to the Buyer.

The Buyer hereby represents and warrants the following to the Sellers, as of the Signature Date
and the Closing Dare:

(i) The Boyer is a non banking financial company, duly organized and validly existing under me laws of India and the Buyer is duly qualified and authorized to do and carry on its business;

(ii) The Buyer has he full corporate power and authority to enter into this Agreement and exercise its rights and perform and comply with its obligations under this Agreement;

(iii) This Agreement has been validly and duly executed and delivered by the Buyer and the executants of this Agreement have been empowered and authorized to execute this Agreement;

(iv) This Agreement constitutes a legal, valid and binding obligation of the Buyer;

(v) No consent, approval, order, registration or qualification of, or with, any court or regulatory,- authority or other governmental body having jurisdiction over the Buyer, the absence of winch would adversely affect the legal and valid execution, delivery and

performance by the Buyer of this Agreement or the taking by the Buyer of any actions contemplated herein, is required;

(vi) The execution and delivery of this Agreement and the consummation of the transactions contemplated herein, do not conflict with or result in a breach of or a default under any of file terms, conditions or provisions of any legal restriction (including, without limitation, any /segment, order, injunction, decree or ruling of any court or governmental authority, or any applicable law) and does not violate or result in the violation of the Buyer's Memorandum and Articles of Association; and The Buyer has conducted a limited due diligence of the Underlying Documents based on a random sample of the same provided by the Sellers and a visit and review of the central payment processing facility (post dated cheque processing) at Chennai.

5.3 The Parties agree that the representations and warranties of each of the Sellers and the Buyer recorded above in Clauses 5.1 and 5.2 respectively shall constitute their sole and exclusive representations and warranties to each other."

36. In the light of the aforesaid clauses, it was agreed that the buyer [STFCL] will retain 20% if the title in loan account is found defective or if for some other reason STFCL is sued by the borrower and to safeguard itself, it was mutually agreed that the liability of each of the

seller [assessee] to the buyer STFCL for all the buyer losses at any time shall not exceed 20% of their portion of actual purchase consideration.

37. After addressing to the objection of the Assessing Officer/DRP/DR, we are of the considered opinion that if the Revenue is objecting to the appointment of the assessee as Debt Recovery Agent, then, principally the revenue has accepted that the transfer of loan has taken place. Further, when the Revenue is objecting to indemnity of 20%, then also the revenue is accepting that actual transfer has taken place.

38. After considering the facts in totality, in the light of the sale agreement and various relevant clauses discussed hereinabove, we are of the considered opinion that transaction has taken place during the year under consideration and loss has crystallized during the year under consideration and the assessee is entitled for claim of loss of Rs. 103.87 crores in the year itself. We, accordingly direct the Assessing Officer to delete the addition of Rs. 104.87 crores.

39. For the sake of completeness of adjudication, we find that the Tribunal had an occasion to consider a similar issue in assessee's own case in ITA No. 4206/DEL/2011 for A.Y 2004-05 and vide Ground No. 4 of that appeal, wherein the claim of loss on sale of loan portfolio of Rs. 29.03 crores was disputed. The relevant findings of the Tribunal read as under:

> "38. We have considered the rival submissions and have perused the record of the case. The assessee was engaged in the business of consumer and auto finance. Accordingly, in course of its business it financed the consumer goods and automobiles. Thus, the debtors were created in ordinary course of business and there was out flow of money from assessee's coffers. It is well accepted commercial fact that realization of loan is one of the most difficult task faced by any money lender. Therefore, entrepreneurs consider various avenues for realization of their dues. Under such circumstances those who are in a position to realize non-performing assets take over loans from entrepreneurs. It is well settled commercial practice to invest in stressed assets which is presently gaining momentum on account of upsurge in NPAS in business and financial institutions. High profile fund managers are finding lot of business prospectus in acquiring non-performing portfolio at considerable discounts. Thus, fund managers are, therefore, investing in the stressed assets space. The government has also eased norms in this

regard. Thus, selling of delinquent loan portfolio was purely a commercial prudent decision taken by assessee in line with the prevailing business practice in order to minimize its business loss. This was a case of outright sale without recourse obligations. The assessee was NBFC and, therefore, the financing was done in ordinary course of business and the loans under current assets acquired more or less the same character as of stock-in-trade and, accordingly, constituted trade debts/ receivables. It is not disputed that amount received on sale of delinquent assets had been adjusted against the outstanding balances and only net amount had been claimed as deduction. Thus, receipts also got accounted for in profit & loss account. Therefore, it was primarily a trading loss arising during the ordinary course of assessee's business. Further, we find that different clauses of memorandum of association reads as under:-

"6.4 It was submitted that the aforesaid activity of the Appellant is in line with the objects stated in its Memorandum of Association ("MOA"). It was explained that Clause III of the MOA lists down the main and incidental/ancillary Objects for which the Appellant Company has been formed. The following relevant Clauses of the MOA were also reproduced for Ld. AO's ready reference:-

"1. To carry on and undertake the business as financers to provide finance for purchase of all types of consumer durables, office plant and equipment, vehicles (including commercial

vehicles, automobiles, four wheelers, two wheelers). chattels, hospital equipments, home appliances, industrial plant and equipment, machinery by way of (but not limited to) lease and hire purchase finance.

2. .....

3. .....

4. .....

5. .....

6. To negotiate loans, to draw, accept, endorse, discount buy, sell and deal in bill of exchange promissory notes, bonds, debentures, coupons and other instruments and securities 38.1. Therefore, this activity was in line with the main objects of assessee also.

38.2. Now coming to the submissions of ld. CIT(DR) that assessee had primarily sold right to receive money. This plea of ld. CIT(DR) has to be considered keeping in view the entire conspectus of the assessee's business. This cannot be considered in isolation de hors of the nature of assessee's business. Ld. counsel has rightly pointed out that had there been direct loss or repossession of assets then the loss would have been allowed. Therefore, on the same footing loss arising out of sale of delinquent assets portfolio also is to be allowed. Admittedly, assessee had right to receive money from its debtors on account of financing of assets. This right had

accrued in favour of assessee in ordinary course of business and not on capital account. Further, we are in agreement with ld. counsel for the assessee that the conditions laid down u/s 36(1)(vii) read with section 36(2)(i) are also fulfilled because of following reasons:

- The debt or loan was in respect of a business which was carried on by the assessee in the relevant accounting year;

- The debt represented money lent in the ordinary course of the business, which was akin to money lending;

- The amount was written off as irrecoverable in the accounts of the assessee for that accounting year in which the claim for deduction was made for the first time.

38.3. In view of above discussion this ground is allowed."

40. Ground No. 2 is accordingly allowed.

41. Facts pertaining to Ground no. 3 are that on a perusal of the international transactions entered into by the assessee revealed that it was making payments for certain Intra Group services [IGS] which had been bench marked under TNMM. A show cause notice was issued by the TPO. The following queries were raised :

(i) "Please furnish all the agreements entered into by the assessee company, related to the Intra Group Sendees obtained by the assessee company from the A Es during the year.

(ii) Please identify each of the services actually received by the assessee company.

(Hi) Please specify the amount of payment made for each of such services. *Please furnish the copy of account of the AE (providing the services) in your books of accounts, and your copy of account in the books of the AE.*

(iv) Please submit the contemporaneous documentary evidence to show that these services have actually been received by the assessee company.

(v) Please justify the need for the receipt of such sendees for which payment has been made.

(vi) Please state with documentary evidence as to when and how these sendees were requisitioned from the AEs.

(vii) Please state as to how the rate or payment for IGS has been determined at the time of entering in to the agreement ? Please also furnish the basis thereof.

(viii) Please state as to whether any cost benefit analysis was done while entering into the agreement and while requisitioning the sendees for payment of IGS?

a. If so the details of such cost bene fit analysis should be furnished. The cost benefit analysis should include the expected benef it from the IGS vis-a-vis the payment made for the same.

b. Please specifically state as to whether any benchmarking analysis was done at the time of entering into the agreement so

as to compare the payment of IGS to the AE vis-a-vis an independent party under similar circumstance. If so, the details thereof.

(ix) Please show with evidence as to what tangible and direct benefit has been derived by the assessee company from the use of such IGS.

(x) Whether the sendees availed from AEs, have also been performed by the assessee company itself or also emailed from independent parties? If yes,

a. The details of such expenditure for each of the services should be furnished.

b. Please state as to why a separate payment has been made for such services to the AE.

(xi) Please furnish details and documentary evidence of cost incurred by the AE for rendering each type of sendees received by the assessee company and the mark up
applied, if any by the AE. Please also state as to whether the cost incurred by the AE is audited.

(xii) Whether AE is rendering such sendees to any other AEs/independent parties also. If yes the details thereof including the rates/amount charged from such AEs along with mark up if any.

(xiii) If the AE has rendered services to more than one entity including the assessee company, then the basis of allocation amongst various entities may be furnished. Please also furnish the basis of choosing a particular allocation key.

(xiv) *Please inform the basis on which the AP has benchmarked the international transaction.*

If the above information is not furnished, complete in all respects, along with contemporaneous documentary evidences, the arm's length payment for these intra-group services would be treated as Nil by applying CUP method. "

42. The assessee filed detailed reply and the submissions read as under:

(a) Please furnish all the agreements entered into by the assessee company, related to the intra group service obtained by the company from the AEs during the year, GECSI has entered into a Master Sendee Agreement with General Electric International Inc.- JapanfGEU Japan) for receiving the regional headquarters services front 01 January, 2008. The copy of agreement has been enclosed as part of ***Annexure-2.***

(b) Please identify each of the services actually received by the assessee company:

The nature of services actually received by the assessee from GEII Japan alongwith other relevant details, is given as part of transfer pricing documentation maintained by the assessee. The transfer pricing documentation has already been fled via submission dated November 16, 2012.

(c) Whether AE is rendering such services to any other AEs/Independent parties also. If yes, the details thereof including the rates/amount charged from such AEs alongwith mark up, if any:

GEII Japan does not render such regional head-quarter sendees to independent parties under same or similar terms and conditions. It however renders this service to its other affiliates across the world. The basis of fees it charges from such affiliates is given in agreement enclosed as Annexure-2

(d) If the AE has rendered service to more than entity including the assessee company then the basis of allocation amongst various entities may be furnished:

The basis of allocation of cost among various group entities is given in agreement entered between GEII Japan and various General Electric affiliates including GECSI, enclosed as part of Annexure-2."

43. It was explained that during the year, the assessee has received Regional Head Quarter Services from its AE General Electric International Inc. Japan. In this respect, a Master Service Agreement was entered into with the AE by which the AE has agreed to provide certain common share services to the various participating GE group entities. The Services are :

i) Chief Executive Officers Office

ii) Capital Markets

iii) Legal Department

iv) Commercial Department

v) Risk Management Department

vi) Compliance Department

vii) Business Development Department

viii) Quality and Operations Department

ix) Information and Technology Department

x) Human Resources Department

xi) Finance Department

44. The TPO was convinced with the claim of the assessee and was of the opinion that no transfer price can be charged if a subsidy corporation utilizes services taking into consideration only the circumstances of the parent corporation and if the subsidiary corporation considering only its own circumstances, would not have utilised the services had it been and independent enterprise. The TPO further observed that the services must actually be performed. The TPO concluded by holding that the assessee has not been able to show the genuineness for such a service or the need and the cost

effectiveness of such arrangement or that the money charged by the AE was at arm's length. No independent party would have made a payment for such an arrangement in uncontrolled circumstances. Accordingly, applying CUP as the most appropriate method, arm's length price of the impugned transaction of payment of service fee was determined at NIL and, accordingly, income of the assessee was enhanced by Rs. 12,31,46,625/-. The objections raised before the DRP were not considered in favour of the assessee and were dismissed.

45. Before us, the ld. AR, at the very outset, stated that on identical set of facts, the co-ordinate bench in one of the group company's case has decided this issue and has remitted the matter for verification of certain facts. The ld. AR supplied copy of the judgment of the co-ordinate bench in the case of GE Money Finance Services Pvt Ltd 179 TTJ 588. The relevant findings of the co-ordinate bench read as under:

> "i. In view of the above decision, it is apparent that "benefit Test" needs to be satisfied but same shall be judged from the viewpoint of assessee and with business prudence. All the decision cited by the ld. AR says that ld. TPO does not have right to question the wisdom of the assessee and he is not required to see whether the assessee is getting direct, tangible,

substantial benefit from the services by replacing the view of ld. TPO in place of views of assessee. Ld. DR also says that these tests may be examined. Now the above two decisions G E Money Financial Services Pvt Limited AY ITA No 5882/Del/2010 5816/Del/2011 & 6282/Del/2012 2006-07 2007-08 & 2008-09 of honourable high court has held that the benefit test cannot be applied from the perspective of revenue and ld. TPO does not have the right to question the wisdom of the assessee. Therefore it is apparent that assessee cannot be asked to demonstrate it with 100 % mechanical precision. If assessee has expected potential benefits out of his business prudence at the time of receipt of services which he can demonstrate from commercial point of view, according to us that satisfies the benefit test for intra Group services. Meaning thereby that the „benefit" needs to be identified from the view point of the assessee which can be potential, reasonably foreseeable, may not be quantifiab e in money alone, may be strategic but it cannot be incidental. The benefit also cannot have the qualification such as "substantial" , "direct" and „tangible" because we do not find any such words in the provision of section 92 (2) of the act. But where the assessee's contentions are bereft of any documentation to show that at the time of availing the services about benefits which were expected, foreseen, visualized, we are of the view that conditions of provision of section 92 (2) of the act Arms" length price of such payments for services are not satisfied because in such circumstances such services will not have any value and no

independent party would pay for such services. All the decision cited by the assessee that benefit cannot be judged from the view point of the revenue also supports the above propositions."

46. For adoption of most appropriate method, the bench observed as under:

"m. For determination of arms Length pricing assessee has adopted TNMM as the most appropriate method and has chosen the foreign AE as the tested party. Ld. TPO has rejected this approach and has held that as these services have been availed in India hence, assessee should be taken as tested party and secondly the method applied should be CUP method. For this ld. TPO has not given any reasoning. Before us the assessee has contested that the foreign AE should be taken as the tested party as the Foreign AEs are least complex and comparable data are available. We have also perused the reason given by the Ld. TPO that as the services are rendered in India then only the India party can be tested party. This reason is flawed and cannot be accepted. In fact the tested party should be the least complex of the transacting parties and for which the data is available for comparability analysis. Therefore, with this issue we direct the ld. TPO to examine the relevant documents as per rule 10B submitted by the assessee and then to decide the issue of tested party, Most appropriate method and comparability analysis."

47. The ld. AR drew our attention to the order of the TPO pursuant to the aforesaid directions of the co-ordinate bench and pointed out that in the remand proceedings, the TPO has accepted foreign AE as tested party and TNMM was accepted as the most appropriate method.

48. The ld. DR could not bring any distinguishing decision in favour of the revenue.

49. In the light of the aforementioned decision of the co-ordinate bench, we are of the considered opinion that the dispute has to be given a fresh look by the TPO in the light of several documentary evidences brought in support of the IGS fee paid by the assessee. We, accordingly, remit the matter back to the file of the TPO/Assessing Officer with the direc ion to consider the issue afresh in light of the decision of the co-ordinate bench [supra]. Ground No. 3 is allowed for statistical purposes.

50. Brief facts of Ground No. 4 are that on perusing the financials of the assessee, the TPO found that the assessee has substantial amount of outstanding receivables from the AEs which remained outstanding for a prolonged period and no interest had been charged on such

amount. The TPO was of the opinion that the assessee has allowed credits to its AEs for a prolonged period. The TPO was of the firm belief that such receivables are within the ambit of international transactions.

51. For this proposition, he drew support from the retro clarificatory amendment to section 92B of the Act by which receivables are to be considered as an international transaction as per Explanation (i)(c) to section 92B which has been inserted with retrospective effect from 01.04.2002.

52. The assessee strongly objected to this action of the TPO contending that at the time of preparation of TP documentation, based on applicable legislation, outstanding receivables was not an international transaction. It was further submitted that early or late realisation of sale proceeds is incidental to the transaction of sale/service and not a separate transaction in itself. It was also contended that considering the delayed payments as unsecured loans is inappropriate and based on assumptions.

53. All the contentions of the assessee were dismissed by the TPO who supported his findings strongly drawing support from the amendment to section 92CA(2A) introduced by Finance Act 2011 w.e.f. 01.06.2011 and retrospective amendment 92CA(2B) introduced by Finance Act 2012 w.e.f. 01.06.2002.

54. Justifying interest @ 13% per annum, the arm's length interest due from the AE was computed as under:

	Name of the AE	Interest
i)	GE Equity International Mauritius	Rs. 15,58,551/-
ii)	GE Capital International Mauritius	Rs. 10,05,897/-
iii)	GE Commercial Distribution Finance	Rs. 18,15,444/-
	Total	Rs. 43,79,892/-

55. The interest has been calculated as per details as furnished by the assessee. Credit period as per payment in the invoice raised has been allowed.

56. The assessee strongly objected to this adjustment before the DRP. The assessee strongly contended that it is not clear as to on what basis the TPO has determined the alleged delayed payment and the

DRP was requested to direct the TPO to share with the assessee the information in possession based on which the said conclusion has been derived.

57. Objections raised before the DRP were of no avail and the DRP confirmed the adjustment made by the TPO.

58. Before us, the ld. AR once again stated that the TPO has not furnished any detail relating to the outstanding period of delay. It is the say of the ld. AR that in the financials of the assessee, under the head "Service Income Receivable", amounts outstanding in respect of 3 AEs are Rs. 41,890/- 25,459/- and 16,411/- respectively.

59. Per contra, the ld. DR showed his inability to explain how the TPO has computed the delay in payment and on which amount considered as outstanding receivables.

60. We have given a thoughtful consideration to the orders of the authorities below. There is no dispute that the TPO has solely based his findings on the retrospective amendment to section 92B of the Act. We are of the opinion that when the impugned T P study report was

furnished by the assessee as per the then applicable provision, outstanding receivables were not considered as international transaction. In our humble opinion, a party cannot be called upon to perform an impossible act i,e., to comply with a provision not in force at the relevant time but introduced later by retrospective amendment.

61. For this proposition, we draw support from the judgment of the Hon'ble Bombay High Court in the case of NGC Networks [India] Pvt Ltd in ITA No. 397 of 2015 dated 29.01.2018 wherein the Hon'ble High Court has followed the view taken by it in CIT Vs. Cello Plast 209 Taxmann 617 wherein the court has applied the legal maxim Lex non cogit impossibilia [law does not compel a man to do that which he cannot possibly perform.

62. Secondly, we find that though the TPO has computed the interest by observing that substantial amount of outstanding receivables from the AEs remained outstanding period for a prolonged period. However, no such substantial amount has been mentioned nor the delay considered as delay for a prolonged period has been mentioned. On the contrary, we find force in the contention of the ld. AR. Exhibit 42

of the paper book under the head 'Service Income Receivable', we find the following:

i)	GE Equity International Mauritius	Rs. 41,890/-
ii)	GE Capital International Mauritius	Rs. 25,459/-
iii)	GE Commercial Distribution Finance	Rs. 16,411/-

63. Since the facts are not coming out from the orders of the authorities below, we deem it fit to restore this issue to the file of the TPO. The TPO is directed to furnish details of substantial amount which, according to him, has been outstanding for a prolonged period keeping in mind the decision of the Hon'ble Bombay High Court [supra and decide the issue afresh. Accordingly, Ground No. 4 is treated as allowed for statistical purposes.

64. Other grounds of the assessee relate to the improper credit of tax deducted at source allowed to the assessee.

65. We direct the Assessing Officer to examine the matter afresh in light of the TDS details furnished by the assessee in its original return, revised return and application filed u/s 155(4) of the Act.

66. The TPO is further directed to verify whether any refund was allowed to the assessee to justify the withdrawal of interest u/s 244A of the Act and levy of interest u/s 234D of the Act. The TPO is directed to charge such interest as per provisions of law and after allowing reasonable opportunity of being heard to the assessee. Miscellaneous grounds are treated as allowed for statistical purposes.

67. In the result, the appeal of the assessee in ITA No. 2066/DEL/2015 is partly allowed for statistical purposes.

The order is pronounced in the open court on 14.05.2019.

Sd/-	**sd/-**
[KULDIP SINGH**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 14th May, 2019

VL/

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	