Ametek Instruments India Pvt. Ltd.,, ... vs Asst.C.I.T., Bangalore on 29 September, 2021

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 &
IT(TP)A No.499/Bang/2016
M/s. Ametek Instruments India Pvt. Ltd., Bangalore

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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI GEORGE GEORGE K., JUDICIAL MEMBER

IT(TP)A No.398/Bang/2016
Assessment Year : 2011-12

ACIT Circle-1(1)(1) Bangalore Vs. M/s. Ametek Instruments India Pvt. Ltd. 1st Floor Left Wing Prestige, Featherlite Tech Park Plot No.148, EPIP 2nd Phase Whitefield, Bangalore 560 066

PAN NO : AAHCA2869B

APPELLANT RESPONDENT

C.O. No.78/Bang/2016
(Arising out of IT(TP)A No.398/Bang/2016)
Assessment Year : 2011-12

M/s. Ametek Instruments India Pvt. Ltd. Whitefield, Bangalore 560 066 Vs. ACIT Circle-1(1)(1) Bangalore

APPELLANT RESPONDENT

IT(TP)A No.499/Bang/2016
Assessment Year : 2011-12

M/s. Ametek Instruments India Pvt. Ltd. Bangalore 560 066 Vs. ACIT Circle-1(1)(1) Bangalore

APPELLANT RESPONDENT

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IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 &
IT(TP)A No.499/Bang/2016
M/s. Ametek Instruments India Pvt. Ltd., Bangalor

Appellant by : Shri Sharath Rao, A.R.
Respondent by : Ms. Neera Malhotra, D.R.

Date of Hearing : 20.09.2021
Date of Pronouncement : 29.09.2021

ORDER

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal filed by the revenue and the cross appeal filed by the assessee along with a C.O. and an appeal against order passed by the Ld. Dispute Resolution Panel-1, Bangalore for the assessment year 2011-12.

2. First we take up the revenue's appeal for adjudication. When this appeal is taken up for hearing, the Ld. Counsel for the assessee has submitted that the tax effect involved in this appeal is below Rs.10 lakhs. As per the latest circular no.21/2015 dated 10.12.2015 of CBDT being retrospective in nature, the appeal filed by the revenue is not maintainable. The Ld. D.R. has not raised any objection. In view of the above, the appeal filed by the revenue is not maintainable. Hence, the same is dismissed.

3. Since the appeal filed by the revenue is dismissed the C.O. filed by the assessee becomes infructuous and hence dismissed.

4. Now we take up the appeal filed by the assessee for the A.Y. 2011-12 against the order passed by the Ld. DRP-1, Bangalore dated 29.12.2015 u/s 144C(5) of the Income-tax Act,1961 ['the Act' for short]. Ground Nos.1 to 3 are as follows:

> IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016
> M/s. Ametek Instruments India Pvt. Ltd., Bangalore
>
> 1. "The learned Assessing Officer ("Ld. AO") and the Honourable Dispute Resolution Panel ("DRP") grossly erred in determining transfer pricing ("TP") adjustment of Rs 2,246,727/- to the Arm's Length Price ("ALP") of the Appellant's international transactions with its Associated Enterprises ("AEs") in the software development services segment;
>
> 2. The Ld. AO and the DRP grossly erred in determining TP adjustment of Rs 33,591,178/-to the ALP of the Appellant's international transactions with its AE in the marketing support services ("MSS") segment;
>
> 3. The Ld. AO / learned Transfer Pricing Officer ("Ld. TPO") erred in rejecting the transfer pricing ("TP") documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Income-tax Act, 1961 ("Act"). The DRP

erred in upholding the same."

5. The above grounds are dismissed as not pressed.

6. Ground Nos.4, 5, 6 & 7 are as follows are inter-related grounds:

> "4. The Ld. AO/DRP erred in law and on facts in upholding the order of the Ld. TPO and aggregating the Non-AE transactions with the international transaction entered into by the AE in the MSS segment;
>
> 5. The Ld. AO/DRP erred in facts in failing to note that the Annual Maintenance Contract ("AMC") services provided by the appellant to Non-AEs in India were different from the MSS provided to the AE;
>
> 6. Without prejudice to the above, the Ld. AO/DRP erred on facts and in law in not restricting the TP adjustment only to the international transactions of the appellant without appreciating that transaction between the appellant and an unrelated party will not come within the purview of section 92B of the Act for determining the ALP.
>
> 7. The Ld. AO/DRP erred in facts in not appreciating that the terms and conditions for rendering services to the AEs vis-à-vis non-AEs are completely different and hence the functions, assets and risks of the AE segment is notably different from the non-AE segment."

7. Ametek India is a wholly owned subsidiary of Ametek Inc. in India. Ametek India is engaged in the provision of sales support and software design services to Ametek Group Companies in respect of their products. In addition, Ametek India is also engaged in the provision of installation, IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore warranty and post- warranty servicing of Ametek products in India. For the financial Year ("FY") 2010-11 relevant to the AY 2011-12, the Assessee filed its return of income on 29 November 2013, declaring taxable income of Rs 3,92,74,880/- under the provisions of the Income Tax Act, 1961 ("Act"). The return was processed under section 143(1) of the Act and the case was selected for scrutiny. The Assessing Officer ("AO") made a reference to the Transfer Pricing Officer ("TPO") to determine the arm's length price ("ALP") of the international transactions of the Assessee with its Associated Enterprises ("AE").

7.1. AS PER TRANSFER PRICING ("TP") STUDY:

> For the subject AY 2011-12, the Assessee had entered into following international transactions:

International Transaction	Amount (in
Purchase of Instruments Spare Parts	1,29,47,876
Provision for marketing Services	18,28,61,849
Engineering IT Services	2,46,04,938

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                   Total                          22,04,14,66
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7.2.   AS PER TOP:
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The TPO vide his order dated 22 January 2015 made the following Transfer Pricing Adjustments Particulars Amount (Rs) Software Development Services 25,82,366 Marketing Support Services 4,07,87,928 Total 4,33,73,294 IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore 7.3. AS PER DRAFT ASSESSMENT ORDER ("DAO"):

The AO has passed the DAO on 13 March 2015 proposing to make the following adjustments to the returned income of the assessee:

Particulars	Amount (Rs)
TP adjustment	4,33,73,294
Disallowance of provision made for slow moving stock	14,73,296
Total	4,48,46,590

The assessee being aggrieved by the additions proposed in the DAO, filed its objections before the Hon'ble Dispute Resolution Panel ("DRP").

7.4. AS PER DRP:

The Hon'ble DRP disposed of the objections filed by the Assessee vide directions dated 29 December 2015 providing partial relief to the assessee.

7.5 AS PER FINAL ASSESSMENT ORDER ("FAO"):.

The AO passed the FAO dated 18 January 2016 giving effect to the directions of the DRP. Accordingly, the TP adjustment of Rs 4,33,73,294/- proposed in the DAD was reduced to Rs 3,58,37,905/- in the FAO (relief of Rs 75,35,389/-). The DRP provided relief of Rs 3,38,639/-and Rs 71,96,750/- in the software developments segment and sales & marketing support services respectively.

Further, full relief has been provided by the DRP with respect to provision for slow moving/ non-moving inventory.

The AO accordingly determined the total income of the Assessee at Rs 7,51,12,785/- in the FAO as against total income of Rs 3,92,74,880/- declared IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016

& IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore by Assessee in the return of income filed for the subject AY 2011-12. The adjustments made by the AO in the FAO are captured below:

Particulars	Amount (Rs)
Returned income	3,92,74,880
Add: Transfer pricing adjustment	3,58,37,905
Total	7,51,12,785

8. The contention of the A.R. is that marketing support services provided to the AE are different from the AMC services provided to third party customers. He drew our attention to the segment revenue & costs from page 9 to 12 of the written submissions as follows:

9.1 Facts:

In relation to the 'sales support services', the Assessee is engaged in the provision of marketing support services to its AE outside India. Further, in relation to the sales to third party customers, the assessee enters into a separate Annual Maintenance Contract ("AMC") or service contracts for products, which are out of warranty period. The Assessee decides the service charges, and terms and conditions of such AMC.

9.2 Proceedings before the TPO In the order passed by the Ld. TPO, the non-AE transactions (AMC services) were aggregated with the international transaction entered into by the assessee with the AE for provision of marketing support services. The TPO observed Third party segment of the assessee of AMC & Others services is nothing different from sales support / market support services rendered by the assessee to its assessee. Accordingly, the AO considered the AMC IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore services and sales support services as one single segment for comparability purpose under TNMM.

9.3 Proceedings before the DRP The DRP confirmed the order of the TPO holding that AMC services rendered to non-AE is functionally similar to the market support service rendered to the AE except the terminology and the description. Further, it has been observed that where segmental information has been allocated based on allocation instead of actuals, the correct segmental margin cannot be ascertained and hence, upheld the order of the TPO.

Accordingly, the Ld. AO passed the Final Assessment Order ("FAO") giving effect to the directions of the DRP.

9.4 Submission of A.R.:

At the outset, it is submitted that the marketing support services provided to the AE are different from the AMC services provided to third party customers. The DRP however, rejected the objections filed by assessee and upheld the findings of the TPO.

The assessee submits that with respect to the transaction between assessee and the third party, the assessee enters into AMC with the third party customers directly to render out of period warranty services for the products of AE sold to the customers in India. In this case, the agreement is in between the assessee and the third party. Further, all the costs incurred in providing the services under AMC are borne by assessee itself. Therefore, it is submitted that the -

a. The assessee independently enters into AMC with the third party customers without the involvement of the AEs;

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore b. All the terms and conditions for the AMC services are decided by the assessee with its third parties;

c. The service is relating to warranty services for the products sold d. The services are provided in India e. There is no contract between the third party customers and the AEs. The suppliers directly contact the assessee for the required service to be rendered;

f. The price to be charged for the AMC services are determined by the assessee and the AEs do not have any control on the same.

g. The revenue from the service activity entirely dependent on the customer requirement, hence the assessee bears risks such as market risk, debtors/credit risk etc. On the other hand, with respect to the transaction with the AE, the assessee renders marketing support services to AE which includes warranty services within warranty period for the products of AE sold to the customers. In this case, the agreement is in between assessee and AE and warranty cost is borne by AE. Generally, warranty for products is provided for one year and in case of repairs the products are being shipped back to the AE by assessee under AEs specific instructions only. The Cost/ expenses relating to post sale (within warranty) and warranty services are charged back to the AE's, on cost plus mark-up basis with service tax. Any repair services provided post warranty period are covered by separate contract between customers and assessee. Assessee also separately enters into AMC contracts with customers. The TP study clearly captures this aspect (Refer page 110 of Paper book- Vol I).

The assessee had also furnished sample invoices raised on AE for the marketing services at a cost plus mark-up of 15% (refer pages 599-602 of Paper book-Vol I) and sample invoices raised on third party customers for IT(TP)A No.398/Bang/2016 &

CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore repair services rendered directly (refer pages 603-607 of Paper book-Vol I).

Therefore, the following factors demonstrate the difference in the nature of transaction with the AE (refer marketing support agreement at Pages 275- 285 of Paper book -Vol 1):

a. The assessee provides market support services which includes pre- sales and post sales (within warranty period) services to the customers under the instructions and control of the AEs b. All the cost incurred by the assessee in providing market support services are charged back to the AEs along with a mark-up; and c. The assessee does not bear any kind of market risk, debtors/credit risk as it is compensated on a cost plus basis.

d. The agreement is with AE outside India From the above, it is abundantly clear that the activities undertaken and the compensation model are distinct from the marketing service provided to the assessee and hence, the same should be looked as separate segments. Without appreciating the above fact and circumstances of the case, the DRP confirmed the order of the TPO and have proceeded to aggregate the third party transaction along with the international transaction on the ground that correct segmental details cannot be ascertained.

Allocation of segment revenue and costs:

The assessee wishes to produce the segment profit and loss account of the assessee which has been submitted during the assessment proceedings (refer page 274 and 308 of Paper book-Vol 1):

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore Trading of Third Party • Particulars Reference Basis of allocation Sales support IT services service instrument, (AMC and Total spare parts Others) Revenue Service Revenue Act..li: 182,861,849 24,604,938 42,292,626 249.759,413 Sales of goods - 8,540.094 8,540,094 Total Revenue A 182,861,849 24,604,938 8,540,094 42,292,626 258,299,507 Costs Cost of Goods Sold B - 5,730.380 - 5.730,380 Personnel Expenditure Actuals 74,818,691 8,117,359 - 24,396.477 107,332,527 IT & MSS -

Actuals Trading Other Operating Costs and third party . 72,533,785 13.451,976 130,658 10.863,627 97,267,873 Revenue ratio MSS - Actuals Depreciation Trading and third 9,397,720 386,845 32.883,186 42,667,751 party Revenue ratio Finance Expenses (Bank Charges) Actuals 4,952 - - 4,952 Total operating costs C 156,755,148 21,569,335 6,247,883 68,143.290 253.003,483 Gross Profit D=A-B 2.809.714 Operating Profits (OP) E=A-C 26,106.701 3.035.603 2,292.211 -25,850,664 5.296.024 GP/Sales F=D/A 32.90% Op e r a t i n g M a r gi n G=E/C 16.65% 14.07% (

OP / T C) (In %) _ _ R e c on c i l i a t i on of P BT Op e r a t i n g p r of i t (L o s s) Ad d: Ot h e r i n c om e 4,320,020 L e s s : N on - o pe ra t i n g e x pe n s e s F i n a n c e c os t s 8,020,715 Pr of i t be f o re t a x e s (PB T) 1,595,329

10. The Ld. D.R. submitted that assessee is rendering AMC to non-AEs in India, which is functionally similar to the so called market support services rendered to the A.E. in India except the terminology and the description. The segmental information provided as certain allocation based on revenue, instead of the actual expenditure, in such circumstances, it is not possible to arrive at correct segmental margin and therefore TPO approach has to be upheld.

11. We have heard the rival submissions and perused the record. In this case, TPO aggregated maintenance services to non AE with similar services rendered to AE as a single segment for comparability purpose as under TNMM method in the case of MSS Segment. In our opinion, this is not possible. However, assessee has to furnish complete segmental information on actual basis which the IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore assessee not provided before the lower authorities. Accordingly, we remit the issue to the file of TPO/AO with the direction to assessee to furnish actual segmented details of market support services rendered to the AE in India.

Thereafter, the AO/TPO has to consider this data to determine the ALP of this segment only. With this observation, the issue remitted to the file of AO/TPO for fresh consideration.

13. Ground No.8 of the assessee is as follows:

> "Without prejudice to the contention that AE and Non-AE segment should not be clubbed, the DRP has erred in law and on facts in considering the goodwill amortization amount of Rs.30,967,437 as operating cost for determining the profit level indicator ("PLI") of the Appellant for AY 2011-12"

13.1 The assessee wishes to submit that the employees working under each business segment are identified based on specific AE (also called as business units) and the departments (eg., market support services/software design/service (trading/AMC)). No common employees are shared between the departments. The cost incurred by every employee in providing the service is identified on actuals. All common costs such as rental expenses, power, stationary, HR and administrative expenses are allocated to the market support service segments which are in turn charged to the AEs with a mark-up.

13.2 From the above, the assessee wishes to submit that as there is no correlation between the service provided under market support service segment and AMC segment. Hence, it is submitted that AMC and MSS segment cannot be aggregated for purpose of determination of PLI of the assessee.

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore Amortization of goodwill to be considered as non-operating in nature:-

> 13.3 Without prejudice to the above submission, it is submitted that the assessee submits that on September 25, 2009, the assessee entered into an Asset Purchase Agreement ("APA") with Thelsa Technical Services Private Limited ("Thelsa") and Unispec Marketing Services Private ("Unispec") for the purchase of specified assets and liabilities. As per the asset purchase agreement, the assessee took over net assets of Rs 2,535,505/- from Unispec against a purchase consideration of Rs 88,547,009/-, and net assets of Rs 5,15,037/- from Thelsa against a purchase consideration of Rs 38,373,282.
>
> 13.4 The excess of the purchase consideration over the net asset of Unispec of Rs 86,011,504/- and that of Thelsa amounting to Rs 37,858,245/- was recognized as goodwill in the financial statements (refer page 9 of Paper book-Vol I). Further, the Management of assessee has estimated the useful life of the asset to be 4 years and accordingly, amortization of the same has been done. Accordingly, goodwill amounting to Rs 3,09,67,437 was written off during the financial year ("FY") 2010-11 relevant to the subject AY 2011- 12 (refer pages 9 and 21 of Paper book-Vol I). Further, the assessee submits that the said amount of Rs 30,967,437 was suo moto disallowed by the assessee in the return of income filed for the AY 2011-12 (refer Income-

tax return, computation of total income and tax audit report in pages 35, 45 and 61 of Paper bookVol I respectively).

13.5 The assessee had included the amortisation of goodwill cost in the Third party (AMC/others) segments (refer page 269 of Paper book- Vol 1).

13.6 The TPO in his order has aggregated the AE and non-AE transaction of the assessee in the 'marketing support services' segment and determined the profit level indicator ("PLI") at 0.11 percent being the ratio of operating IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore profit over operating cost. The Ld. TPO has included the amortization amount of Rs 30,967,437 for computing the PLI of the assessee holding the same to be operating in nature.

13.7 The DRP while upholding the order of the Ld. TPO failed to take note of the inclusion of the extra-ordinary item of write-off of goodwill in the operating cost for determining the PLI of the assessee. Given the same, the assessee filed a rectification petition under section 154 of the Act on March 10, 2016 before the DRP seeking rectification of the DRP directions dated December 29, 2015(refer pages 612-614 of Paper book-Vol I). It is humbly submitted that that the DRP has not adjudicated the said application filed by the assessee filed on March 10, 2016 till date.

13.8 The assessee wishes to submit that, assuming without admitting that the marketing support services provided to the AE and the AMC services provided to the third party customers are clubbed, the extraordinary/non- operating item (i.e.) amortization of acquired goodwill amounting to Rs 30,967,437 should not be considered for determining the PLI. Assessee relies on the decision of the Delhi Tribunal in the case of ST Ericssson India Private Limited (ITA No. 609/Del/2015) wherein the tribunal has held that amortization of goodwill is an extra ordinary item and is not pertaining to the regular operation of the assessee, and hence non- operating in nature.

Hence, it is submitted that the revised computation are as follows:

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Service Revenue                    225,154,475                  225,154,475
Total Revenue                      225,154,475                 225,154,475


Operating costs
Personnel expenditure               99,215,168                 99,215,168
Other operating costs               83,397,412                 83,397,412


                                       IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 &
                                                            IT(TP)A No.499/Bang/2016
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M/s. Ametek Instruments India Pvt. Ltd., Bangalore Depreciation and amortization 42,280,906 42,280,906 Less: Amortization of Goodwill (30,967,437) 11,313,469 _ Finance expenses 4,952 4,952 Total operating costs ("OC") 224,898,438 19,39,31,001 Operating profit ("OP") 256,037 3,12,23,474 Operating margin 0.11 OP / OC (p_ercentL 16.10 13.9 The assessee wishes to submit that with the above PLI of the assessee of 16.10%, the average margins of the comparable companies would be within +/- 5 percent from the margin of the assessee after exclusion of the extraordinary item.

14. The Ld. D.R. submitted that the issue may be remitted to the Ld. DRP wherein the petition filed u/s 154 of the Act dated 10.3.2016 is pending before the DRP.

15. We have heard the rival submissions and perused the record. In principle, we are of the opinion that amortization of goodwill is an extraordinary item and is not pertinent to the regular operation of the assessee and hence non-operating in nature. However, this issue is not emanated from the order of the DRP. We are refrained from commenting on this issue. The remedy lies with the assessee before the DRP on account of biding proceedings u/s 154 of the Act, which may be pursued by the assessee. This ground of assessee is dismissed.

16. Ground Nos.9 & 10 are dismissed as not pressed.

17. Ground No.11 related to Software development services which is reproduced below:

> IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore The DRP erred in rejecting the following companies despite the same being functionally comparable to the appellant

and qualify the filters applied by the Ld. TPO. The comparables therefore ought to have been accepted as comparable:

a) Synfosys Business Solutions Ltd.

b) CG-VAK Software & Exports Ltd.

c) Evoke Technologies Ltd.

d) R.S. Software (India) Ltd.

17.1 Out of 4 comparables, R.S. Software India Ltd. comparable (d) is not pressed by A.R. and dismissed accordingly.

17.2 Now coming to first comparable (a) Synfosys Business Solutions Ltd. The Ld. A.R. submitted that Synfosys Business Solutions Ltd. is only engaged in software development. It is seen from its financials placed at page No.986 of the paper book as follows:

> 01.04.2010 to 31.03.2011 Details principal products and services Unless otherwise specified, all monetary values are in INR ITC Number of produce Nil Description of product or services Software Development IT solutions Unit of measurement of principal product or Nil services Turnover of principal product or services 9,69,08,245 Quantity of principal product or services (in [pure]0 UoM) There is no reason to reject this comparable as a comparable by observing by the DRP no segmental information available in this case. The Ld. D.R. relied on the order of DRP.

18. We have heard the rival submissions and perused the materials available on record. The DRP observed that Synfosys Business Solutions Ltd. is engaged in both SWD & ITS in nature and also building and managing enterprise IT IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore Infrastructure comprising life cycle services in data centre management desk, top management, data based administration and web observation and also no segmental data but we find from the financials of this company filed for the year ending 31.3.2011 and this company is only engaged in software development services and ITES solutions and turnover is Rs.96,90,08,245/-. The same was reflected in P&L account. Being so, we remit this issue to the file of TPO/AO for his reconsideration.

19. CG-VAK Software and Exports Ltd. This was rejected by the DRP by observing as under:

> "2.21 We examined the Annual Report, from which it is evident that the company is engaged in the software development, services and products. In the schedule to the account, no details of employees cost have been given and therefore, it is not possible to ascertain, as to whether the company passes the employees cost filter applied by the TPO, as in the profit and loss account, the expenses have been debited under the head 'cost to services', such companies cannot be retained as comparable, this view

> also finds support from the decision of the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. (ITA 102/2015) in which in paragraph 38 it is held that "plainly, a business model where services are rendered by employee own employees and using one's own infrastructure would have a different cost structure as compared to a business model where services are outsourced. There was no material for the Tribunal to conclude that the outsourcing services by ..... would have no bearing on the profitability of the said entity'. In view of the above, we do not find any infirmity in exclusive of the above company from comparables, the employees cost filter of 25% applied by the TPO which finds support from the decision of the Hon'ble Delhi Bench of ITAT in the case of Navisite India PVt. Ltd. in ITA No.5329/2012."

20. The contention of the AR is that the issue may be remitted to the TPO/AO to consider the relevant employees data and decide afresh. Relevant cost may be obtained by AO/TPO by issuing notice u/s 133(6) of the Act.

21. We have heard the rival submissions and perused the record. We find force in the argument of Ld. A.R. if the relevant data relating to employees cost is not available in respect CG VAK software and exports ltd., it ought to have IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore been collected by the TPO by exercising power u/s 133(6) of the Act. Accordingly, the issue remitted to the AO for fresh consideration.

22. Evoke Technologies:

> The Ld. A.R. submitted that this comparable was suo moto excluded by the DRP by observing that its annual report states that consultancy charges was increased from Rs.9,57,480 top Rs.1,07,17,303/- which worked out to 1118%, which fact the margin of company as such it cannot be a comparable.

23. The Ld. D.R. submitted that in TNMM method only margins to be compared and not the increase/decrease in the head of expenditure shown in the P&L account. For this purpose, he relied on the order of the Tribunal in the case of Deputy Commissioner of Income-tax Vs. Sumi Motherson Innovative Engineering Ltd. 42 Taxmann.com 242 (Del) Tribunal.

> "Be that as it may, it is not allowed to compare each and every item of the operating cost incurred by the assessee with similar cost in the case of comparables to ask for adjustment rather it is the overall effect of all such individual items culminating into operating profit, which is considered for benchmarking the assessee's international transaction. It is quite natural that if asset is purchased, the amount of depreciation on a written down value method will be higher but the repair cost will be low. In contrast to that, when the asset grows old, though the amount of depreciation will march southwards, but the expenses on repairs will assume sojourn to the north coupled with the higher wastage and lower output due to frequent breakdowns. If the

amount of depreciation is distinctly compared with comparables leaving aside other related and consequential items, such as repair costs etc., the results are likely to be distorted. It shows that increase in one expense cannot be viewed in isolation. It is required to be examined with its corresponding effect on related items. Such increase or decrease in individual items of expenses may be due to a particular business model adopted by the assessee. To cite an example, an increased amount of Salaries may be due to the policy of the assessee in comparatively more outsourcing of items. In such a situation, though the expense under the head 'Salary' will be less, but there will be more 'Job work charges' etc. A company which outsources less and sticks to more own production regime, may need to have more assets, which may result in higher amount of depreciation. In such a case, claiming adjustment on account of higher depreciation will be absurd. Similarly, an entity may book entire salary expense under one head, while another may bifurcate it into different parts and include some part in Marketing expenses or Factory overheads etc. In such a case also, the comparison of 'Salary' expense in separation will be meaningless. In the like manner, one company may use more rented premises or vehicles in comparison with the other, which has its own premises and vehicles. Whereas in the case of the former, the amount of rent or vehicle maintenance charges will be higher, but the amount of depreciation in the case of the later will be more because of use of more assets of its own rather than taking the facility of hired ones. The crux of the matter is that a higher amount of a particular expenditure per se can be no reason to claim adjustment IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore in profit ratio. That is the reason for which the legislature has provided for comparing composite figure of operating profit which envelopes the overall effect of all the items of operating expenses and revenues. One is not laying down the proposition that once the operating profit is ' available, then no adjustment is possible. Sub-clause (iii) to rule 10B(1)(e) clearly provides that the normal gross profit mark-up of comparables is adjusted to take into account the functional and other differences, if any, between the international transaction and the comparable uncontrolled transactions etc. To ask for adjustment, it is sine qua non that there should be some independent and substantial reason for claiming adjustment in profit rate of comparables. The singular effect of higher quantum of an item of expenditure de hors the other relevant factors, is not permissible. In the context of depreciation, one can rightly appreciate the need to make adjustment, if rate of depreciation charged by the assessee vis-a-vis its comparables is different, but simplicitor difference in the amount of depreciation is in consequential. As there is nothing to show in the extant case that the assessee did charge depreciation at higher rates in comparison with its comparables, even the alternative prayer of the assessee cannot be accepted. [Para 6.1]".

24. The Ld. D.R. submitted that there is a substantial increase in the consultation charges as seen from the financials of Evoke Technologies Ltd., which was excluded by the DRP from the list of comparables.

25. We have heard the rival submissions and perused the record. As rightly pointed out by the Ld. A.R. in determining the ALP under TNMM method is only under margins to be considered and not the increase/decrease in the individual item of expenditure of the relevant comparable. However, in the present case, there is a substantial increase in the revenue of Evoke to the tune of 30% as compared to earlier years, which is usually abnormal. On that reason, it was excluded and it is not only the reason of increase in the consultation charges. Being so, the assessee not offered any explanation for substantial increase in the profit of Evoke Technologies Ltd. by 30% in the immediate earlier year. Being so, DRP justified in rejecting this as comparable.

26. Ground No.12 of the assessee is on the following comparables:

> "The DRP erred in upholding the order of the Ld. TPO considering the following comparables despite the same being functionally different to the appellant or fails to meet the legally acceptable criteria for comparability. The following comparables therefore ought to have been rejected as comparable:
>
> • Persistent Systems Ltd.;
>
> • Sasken Communication Technologies Ltd."

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27. The contention of the A.R. is that on account of turnover filter and related party transaction filter, this comparable has to be excluded. Further, regarding Persistent Systems it was submitted that it has diversified activities and functionally not comparable on the reason that it has product revenue, on site operations and having turnover greater than Rs.500 crores and also having related party transactions. Further, regarding Sasken Communications, it was submitted that that company functionally different and having diversified activities and huge turnover.

28. The Ld. D.R. submitted that this company specialized in software product development services and its partner closely with the world's largest technology branch innovative enterprises and pioneering start ups to provide end to end product development services. The company has 297 customers with whom the company has long term contact for software development. It is also evident that company is predominantly engaged in outsourcing software product development services. The company is comparable with the assessee's functions being the activities of this company is comparable with the assessee company and it has to be upheld.

29. We have heard the rival submissions and perused the materials available on record. This company Persistent Systems Ltd. is not comparable in the case of Electronic Imaging India Pvt. Ltd. in IT(TP)A No.1506/Bang/2016 dated 14.7.2017.

Persistent Systems Ltd.

"8. Having considered the rival submissions as well as the relevant material on record, first we will deal with the functional comparability of the six companies namely Acropetal Technologies Limited (Seg.), E-Zest Solutions Ltd., L&T Infotech Ltd., Persistent System & Solution Ltd., Persistent Systems Ltd. and Tata Elxsi Limited. The business activities of these six companies have been examined on the point of functional comparability in the software development services provider by the co-ordinate bench of this Tribunal vide decision dt.

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore 21.9.2016 in the case of Applied Materials India (P.) Ltd. (supra) in paras 9.1.1 to 9.2.4; 16.1 to 16.4 and 19 to 20 as under:

' (i) E-Jest Solutions Ltd.

9.1.1 The learned Authorised Representative has submitted that the assessee raised the objection before the DRP for exclusion of this company from the set of comparables but the DRP has not adjudicated the objections of the assessee. He has referred the objections raised before the DRP at page No. 1373 of the paper book as well as referred the relevant part of the Annual Report of this company at page Nos. 39, 42 & 50 of the Annual Report. The learned Authorised Representative has submitted that this company is engaged in the diversified activity and reported the income under only one segment.

Therefore it cannot be considered as a comparable of the assessee's software development services segment. He has relied upon the decision of the co-ordinate bench of this Tribunal dt.22.4.2016 in the case of Electronics for Imaging India (P.) Ltd v. DCIT in IT (TP) A Nos. 227 & 285/Del/2013.

9.1.2 On the other hand, the learned Departmental Representative has submitted that the main activity of this company is software development services. Therefore the insignificant variation in activity if any cannot be a determinative factor while computing the ALP under Transactional Net Margin Method (TNMM). He has relied upon the decision of the Delhi Bench of ITAT in the case of Toluna India (P.) Ltd v. ACIT (2014) 151 ITD 177.

9.1.3 We have considered the rival submissions as well as the relevant material on record. We find that the assessee has raised objections against this company before the DRP. However the DRP did not adjudicate the objections raised by the assessee. The decision of this Trintinal in the case of M/s. Electronics for Imaging India (P.) Ltd. v. DCIT (supra) relied upon by the learned Authorised Representative is based on two aspects (i) The information received under Section 133(6) of the Act was considered by the TPO without sharing with the assessee and (ii) nature of the activity is KPO. It is pertinent to note that the question of BPO and KPO is relevant only in ITES segment and not for software development services segment. On the contrary, the decision in the case of Toluna India (P.) Ltd v. ACIT (supra), pertains to the Assessment Year 2007-08, therefore the facts of the different year cannot be applied without verification. Accordingly, we set aside this issue of comparability of E-Jest Solutions Ltd. to the record of the Assessing Officer/TPO for deciding the same after verification of the relevant facts as well as considering the objections of the assessee.

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(ii)    Persistent Systems and Solutions Ltd.
(iii)   Persistent Systems Ltd.
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9.2.1 These two companies were part of the TP Study analysis however the assessee raised objections against these companies before the TPO as well as DRP.

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore 9.2.2 Before us, the learned Authorised Representative of the assessee has submitted that these companies are functionally not comparable to the assessee as these are engaged in diversified activity i.e. rendering of software development services and licensing, royalty of software products. Thus without having the separate segmental details and data these diversified activities cannot be compared with the assessee. He has further pointed out that the company Persistent Systems Ltd. also engaged in developing products and therefore the activities are not comparable with that of the assessee. In support of his contention, he has relied upon the decision of this Tribunal dt. 24.2.2016 in the case of DCIT v. Electronics for Imaging India (P.) Ltd. (supra) and submitted that this company was found to be not comparable with the software development services provider. He has further pointed out that in assessee's own case for the Assessment Year 2010-11, the DRP vide its order dt. 24.11.2014 has excluded Persistent Systems and Solutions Ltd. from the list of comparables by holding that this company is not comparable to the assessee. 9.2.3 On the other hand, the ld. DR has submitted that the TPO as well as DRP has examined the functional comparability of these companies and found that these companies are comparable with the assessee. These two companies have satisfied all the filters applied by the TPO and DRP therefore the minor variation in the activity would not render these companies non-comparable when a comparable price is considered under TNMM. 9.2.4 We have considered the rival submissions as well as the relevant material on record. At the outset we note that the functional comparability of these two companies have examined by the coordinate bench of this Tribunal in the case of DCIT v. Electronics for Imaging India (P) Ltd (supra) in paras 60 and 61 & paras 24 to 26 as under:

> " Persistent Systems & Solutions Ltd
>
> 60. The assessee has the grievance against rejection of this company by the DRP. The ld. AR has submitted that assessee did not raise any objection against this company, however, the DRP has rejected the said company. Therefore, the said company should be retained in the list of comparables.
>
> 61. Having considered the rival submissions as well as relevant material on record, at the outset, we note that the DRP has examined the functional comparability of this company by considering the relevant details as given in the annual report of this company. The DRP has given the finding that the entire revenue has been earned by this company from the sale of software services and products and in the absence of segmental details, it cannot be considered as comparable with software services

segment. We find that this company has shown the income from sale of software services and products to the tune of Rs.6.67 crores. We further note that as per Schedule 11, the entire revenue has been shown under one segment i.e., sale of software services and products. Therefore, no separate segment has been given in respect of software services. Accordingly, the composite data of revenue as well as margins of this company pertaining to the sale of software services and products cannot be considered as comparable with the software development services segment of the assessee. In view of the above facts and circumstances, we do not find any error or illegality in the directions of the DRP in excluding this company from the list of comparables. This ground of CO is dismissed.

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore (4) Persistent Systems Ltd

24. We have heard the ld. DR as well as ld. AR and considered the relevant material on record. The assessee raised objections against selection of this company on the ground that this company is functionally not comparable as engaged in the product development The segmental information for services and product is not available. Further, the assessee has also, pointed out that there was an acquisition and restructuring during the year under consideration.

25. The DRP has noted the fact that this company has reported the entire receipt from sales and software services and product. Therefore, no segmental information was found to be available for sale of software services and product. Further, the DRP has noted that as per Note 1 of Schedule 15, this company is predominantly engaged in outsource software development service. Apart from the revenue from software services, it also earns income from licence of products, royalty on sale of products, income from maintenance contract, etc. These facts recorded by the DRP has not been disputed before us.

26. Therefore,when this company is engaged in diversified activities and earning revenue from various activities including licencing of products, royalty on sale of products as well as income from maintenance contract, etc., the same cannot be considered as functionally comparable with the assessee. Further, this company also earns income from outsource product development. In the absence of any segmental data of this company, we do not find any error or illegality in the findings of the DRP that this company cannot be compared with the assessee and the same is directed to be excluded from the set of comparables."

We further find from the Annual Report that there is no change in the activity and functions of these companies during the year under consideration in comparison to the Assessment Year 2010-11. Accordingly, following the decisions of the co-ordinate benches of this Tribunal (supra), we direct the AO/TPO to exclude these two companies from the set of comparables."

"16.1 The DRP rejected this company on the ground of employee cost filter. The Id. DR has submitted that the TPO has applied the employee cost filter and this company satisfies the same.

16.2 On the other hand, the learned Authorised Representative of the assessee has submitted that the total employee cost of this company is 11.51 of the total operating revenue therefore it fails the employee cost filter of 25%. Further he has pointed out that this company also fails the software development services revenue filter of 75%. He has referred the details at page Nos. 39 and 53 of the Annual Report and submitted that the income from software development is Rs.81.40 Crores out of total revenue of Rs.141 Crores. Therefore this company fails this filter.

16.3 In a rejoinder the Id. DR has submitted that the TPO has considered only Information Technology transactions segment and therefore it satisfies software development services income filter as well as employee cost filter.

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore 16.4 We have considered the rival submissions as well as the relevant material on record. As per the segmental reporting at page 53 of the Annual Report the income from Information Technology Services is Rs. 81.40 Crores out of the total income of Rs. 141 Crores. Therefore the revenue from Information Technology transactions services is less than 75% and consequently this company does not satisfy the filter of information technology revenue applied by the TPO itself. Accordingly, we do not find any reason to interfere with the order of the DRP for this issue."

" (iv) L&T Infotech Ltd.

19. We have heard the learned DR as well as learned DR and considered the relevant material on record. The DRP rejected this company by recording the facts at page 15 as under:

On perusal of schedule to the notes of the accounts, it is noticed by us that expenses incurred in foreign currency are 938.94 crore (48.84%), out of the total expenses of Rs.1920.46 crore debited in profit and loss account, these expenses include the sub-contracting expenses to the extent of Rs.118.01 crore, which indicates that the company has the on-site revenue of about 50%, it is also noticed by us that in the profit and loss account, the revenue has been shown from software development services and products, in the segmenting account it is mentioned that the segment revenue include sales directly identifiable with/allocable to the segment, in Schedule 18, the revenue have been shown from 3 segments, i.e. financial services, manufacturing and telecom. However, in paragraph 23, it is mentioned that the company is mainly engaged in the business of software development. The Assessing Officer has considered entire revenue from 3 segments from the software development services. Out of the software development expenses of Rs.1,488.30

crore debited in profit and loss account, salary to overseas staff is Rs.1200.28 crore which also indicates that the company is predominantly engaged in development, of software on-site. In view of the above differences, in our view the above company cannot be retained as comparable, the Assessing Officer is accordingly directed to exclude the above company from comparable. We further find that the comparability of this company has been considered by the co- ordinate bench of this Tribunal in the case of DCIT v. Electronics for Imaging India (P) Ltd (supra) in paras 62 to 65 as under :

" 62. The assessee has raised objection against this company on the basis of high turnover in comparison to the assessee. It was also contended that related party transaction (RPT) of this company is 18.66%. The DRP rejected objections of the assessee on the ground that TPO has applied 25% filter of RPT and annual report of the company does not show any other services rendered other than software development services provided by this company. Thus the DRP held that software development segment is comparable to the assessee and therefore this company has to be retained as comparable.

63. We have heard the Id. AR as well as Id. DR and considered the relevant material on record. The Id. AR has submitted that this company is having 18.66% RPT and further this company earns revenue from both services and products. Thus, the Id. AR submitted IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore this company is also in the software products and therefore cannot be considered as good comparable. He has further contended that in a series of decisions, the Tribunal has applied 15% RPT filter and since this company is having more than 15% RPT, the same cannot be considered as a good comparable.

64. Onthe other hand, the Id. DR has submitted that TPO has applied RPT filter of 25% and therefore only for this company, the RPT cannot be reduced to 15%. Further, the DRP has examined annual report of this company and found that this company earns revenue from software development services and accordingly is comparable.

65. We have considered the rival submissions and relevant material on record. We find that in the normal circumstances the tolerance range of RPT should not be more than 15%. In the case of the assessee, the availability of the comparable is not an issue and therefore we do agree with the view taken by the coordinate Benches of the Tribunal that the threshold limit of tolerance range should not exceed 15% as far as RPT revenue is concerned. Therefore, we direct the AO/TPO to apply 15% RPT filter in respect of all the comparables."

In view of the facts recorded by the DRP as well as the decision of the co-ordinate bench, we do not find any reason to interfere with the directions of the DRP.

(v) Tata Elxsi Ltd (Seg.) :

20. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. The DRP has rejected this company by discussing the fact at page 16 as under:

> Directed to exclude as per paragraph 2.7 of the order, further, on perusal of annual report, it is noticed by us from page 14 that software development and services consist of embedded product design, industrial design and visual computing labs which are not comparable to the software development services provided by the assessee and therefore, we direct the Assessing Officer to exclude the above company from the comparables.
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> We further note that the DRP has also recorded the fact that export revenue of this company is 73.30% which is less than 75% applied by the TPO. Therefore this compar% does not qualify the export earning filter applied by the TPO. Further the co- ordinate bench of this Tribunal in the case of DCIT v. Electronics for Imaging India Pvt. Ltd (supra) has considered this issue in paras 30 to 33 as under :
>
> 30. The assessee has raised objections against this company on the ground that the company is functionally different from the assessee. Though the TPO has considered the software development and services segment of this company as comparable to that of assessee, however, the assessee contended that even within the software segment, this company is engaged in diverse activities. The assessee placed reliance on the information in the annual report under the Directors Report and submitted before the DRP that even under the software development services segment, this company is engaged in various diversified activities including product design service, innovation design, engineering service, visual computing labs, etc. The assessee IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore also placed reliance on the decision of Mumbai Bench of the Tribunal in the case of Telcordia Technologies Pvt. Ltd v. ALIT, 137 ITD I (Mum).
>
> 31. The DRP found that this company is not functionally comparable with assessee company as it is engaged in diversified activities even in the software development services. The DRP has followed the decision of the Mumbai Bench of the Tribunal in the case of Telcordia Technologies (P) Ltd. (supra).
>
> 32. We have heard the Id. DR as well as Id. AR and considered the relevant material on record. We find that this company even in the software development segment is engaged in diversified activities of product design services, innovation design, engineering services, visual computing labs, etc. We further note that in the case of Telcordia Technologies (P.) Ltd. (supra), the Mumbai Bench of the Tribunal vide its order dated 11.5.2012 in para 9.7 has held as under:-- "7.7 From the facts and

> material on record and submissions made by the learned AR, it is seen that the Tata Elxsi is engaged in development of niche product and development services which is entirely different from the assessee company. We agree with the contention of the learned AR that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we are unable to treat this company as fit for comparability analysis for determining the arm's length price for the assessee, hence, should be excluded from the list of comparable parties."
>
> 33. No contrary view has been brought to our notice regarding comparability of this company with that of a pure software development service provider. Accordingly, in view of the decision of the Mumbai Bench of the Tribunal in the case of Telcordia Technologies Pvt. Ltd. (supra), we do not find any reason to interfere with the finding of the DRP. "

In view of the facts recorded by the DRP as well as the decision of the Tribunal in the case of DCIT v. Electronics for Imaging India (P) Ltd. (supra), we do not find any error or illegality in the directions of the DRP to exclude this company form the set of comparables.' We further note that the Tribunal in the case of AMD India (P.) Ltd (supra) has again taken similar view in respect of these six companies. Following the earlier order of the Tribunal, we direct the TPO/AO to exclude these six companies from the set of comparables."

30. Accordingly, we direct the A.O. to exclude this comparable from the list of comparables.

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31. Sasken Communication Technologies Ltd.

The contention of the A.R. is that the company is engaged in different function and is to be rejected. Even otherwise, it was pleaded that on the basis of turnover filter, it has to be excluded from the list of comparables. The Ld. D.R. submitted that this comparable passes a 7.5% revenue from the software services. As such it has to be comparable to the assessee case.

32. We have heard the rival submissions and perused the record. This comparable is considered as not comparable in the case of Electronic Imaging India Pvt. Ltd. in IT (TP)A No.1506/Bang/2016, where in it was held as under:

> "9. The functional comparability of these two companies have been examined by the Delhi Bench of ITAT in the case of Saxo India (P.) Ltd (supra) in paras 10.1 to 10.2 and 15.1 to 15.2 as under:

> " (i) E-Infochips Limited:
>
> 10.1 The Transfer Pricing Officer included this company in the list of comparables. On being called upon to explain as to why it should not be considered as a comparable, the assessee contended that there was functional dissimilarity inasmuch as this company was engaged in software development and IT enabled services and also Products. The Transfer Pricing Officer observed that the revenues of this company from Products was only 15% of total revenue and hence the same qualified to be eligible for comparison. The DRP did not allow any relief.
>
> 10.2 After considering the rival submissions and perusing the relevant material on record, we find that the Annual report of this company is available in the paper book with its Profit and loss account at page 1025. Schedule of Income indicates its operating revenue from software development, hardware maintenance, information technology, consultancy etc. Revenue from hardware maintenance stands at Rs. 3.92 crore, which has been considered by the Transfer Pricing Officer himself as sale of products. Such sale of products constitutes 15% of total revenue. There is no segmental information available as regards the revenue from sale of products and revenue from software development segment. As the assessee is simply engaged in rendering software development services and there is no sale of any software products, this company, in our considered opinion, ceases to be comparable. It is obvious that from the common pool of income from both the streams of software products and software services, one cannot deduce the revenue from software services and no one knows the impact of revenue from Products on the overall kitty of profit, which may be significant. Since no segmental data of this company is available indicating operating profit from software development services, we order to exclude this company from the list of comparables."

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore " (vi) Sasken Communications Technologies Ltd 15.1 The TPO included this company in the set of comparables despite the assessee's objection that it was functionally different and also had Product portfolio. 15.2 After considering the rival submissions, we find from page 58 of the TPO's order that he has recognized sale of software products to the tune of Rs. 37 crore and odd. Though the break-up of revenue from software services and software products is available, but, the break-up of operating costs and net operating revenues from these two segments have not been given. It is further observed that the TPO has taken entity level figures for the purposes of making comparison. Since such entity level figures contain revenue from both software services and software products, as against the assessee only providing software services, we are disinclined to treat this company as comparable. The assessee's contention is accepted on this issue."

We further note that the Hon'ble High Court vide its decision dt.28.09.2016 has confirmed the decision of the Delhi Bench of ITAT. We are aware that the co-ordinate bench of this Tribunal in the case of Applied Materials India (P.) Ltd. (supra) has remitted the issue of functional comparability of Sasken Communication Technologies Ltd. that in the said case the DRP did not adjudicate the objections of the assessee. Therefore in view of the decision of the Delhi Bench of the Tribunal in the case of Saxo India (P) Ltd (Supra) which has been confirmed by the Hon'ble Delhi High Court, we direct the TPO/AO to exclude these two companies from the set of comparables."

33. Taking a consistent view, we are inclined to direct the AO/TPO to exclude this comparable from the list of comparables to determine the ALP of international transaction.

34. Ground Nos.13 & 14 are as under:

> 13. The Ld. AO/DRP has erred in the computing the negative working capital adjustment without considering the fact that the appellant does not have any working capital risk;
>
> 14. The LD. AO/DRP erred in proposing a restriction to the working capital adjustment without giving any cogent reason.

35. The Ld. A.R. submitted as follows:

> The TPO after arriving at average margin of the comparable companies at of 24.82 percent%, worked out a negative working capital adjustment of 1.24% percent, thereby making determining the ALP at 26.06%.

IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore The Assessee submits that working capital adjustment is made for the time value of money lost when credit time is given to the customers. The Assessee however is not an entrepreneur but a captive service provider. Under the circumstances, the Assessee does not stand to lose anything as it is compensated on a total cost plus basis on the international transaction entered into with the AE. Hence, it is humbly submitted that the assessee is running its business without any working capital risk while comparable companies have such a risk for them. It is further submitted that if any working capital adjustment is to be made to this situation, only a positive adjustment has to be made to the comparable company so that they are brought on par with the Assessee.

The Assessee wishes to place reliance on the following case laws, wherein the various tribunals including the jurisdictional have held that negative working capital adjustment shall not be made in case of a captive service provider as there is no risk and it is compensated on a total cost plus basis:

> o Tivo Tech (P) Limited (2020) 117 taxmann.com 259 (Bangalore-Trib) • Digital Juice Animation Private Limited IT(TP) A No. 215/Bang/2017 • FNF India Private Limited (2020) 116 taxmann. corn 976 (Bangalore- Trib) • Lam Research India Private Limited IT(TP) A No. 1437/Bang/2014 (Bangalore ITAT) • Adaptec (India) Private Limited (2015) 57 taxmann.com 307 (Hyderabad-Trib) • IPass India Private Limited (IT(TP)A No. 677/Bang/2016) • IPass India Private Limited (IT(TP)A No.

2533/Bang/2017) • Core One Technologies Private Limited (ITA No. 257/Bang/2015) • Lam Research (India) Pvt. Ltd.(I T(TP)A No.2490/Bang/2017) IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore Hence in the light of the above factual matrix and legal position, the Assessee prays that no negative working capital can be made in the subject case.

36. On the other hand, Ld. D.R. submitted that there is no merit in the argument of the Ld. A.R. with regard o the methodology of computing working capital adjustment and it was remitted by the DRP to compute the mean of the working capital adjustment in respect of comparables retained after giving effect to the direction of the DRP. She relied on the order of the DRP.

37. We have heard the rival submissions and perused the record. Admittedly, similar issue came up for hearing before this Tribunal in the case of e4e Business Solutions India Pvt. Ltd. (ITA No.2900/Bang/2018 dated 8.12.2020), wherein it was held as follows:

> "12.The third issue is with regard to grant of negative working capital adjustment. Working capital adjustment is made for the time value of money lost when credit period is given to customers. It is the submission of the Id. counsel for the assessee in this case that the assessee is a captive unit which is entirely funded by the AE. The assessee has no borrowings and is fully compensated by the parent on a total cost plus. The assessee has no working capital risk - in other words, it is a risk-insulated service provider to the parent. The only customer of the company is its parent company. The Id. counsel for the assessee has relied on a host of ITAT decisions, the main decision being that of M/S. Software AG Bangalore Technologies Pvt. Ltd.(supra) which in turn has relied on the decision of ITAT Hyderabad in the case of Adaptec (India) Private Limited and contended that no negative working capital adjustment is called for. The Id.DR's reliance is on the decision in the case of Technotree Convergence P. Ltd. (supra) wherein it was held that negative working capital adjustment has to be allowed.
>
> 13.Comparables chosen operate under varied economic conditions. Therefore, while comparing a company to that of similar companies, it is necessary to undertake comparability adjustments.Balance sheet adjustments are intended to account for different levels of inventories, receivables, payables, interest rates etc. The most common balance sheet adjustments made to reflect different levels of accounts receivable, account payable and inventory are known as working capital adjustments. As mentioned IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore by the OECD, comparability adjustments should not be performed on a routine or mandatory basis but rather on a case by case basis depending on the facts and circumstances. Economic rationale of Working capital of a business Is the capital used in its day-to-day trading operations. Working capital is affected by numerous business incidences. It is very common for tested party and each of the potential

comparables to differ materially in the amount of working capital (inventory, accounts receivables and payable). Such differences are mainly caused due to differences in the terms of purchase and sale, levels of inventory etc. For example: If the business advances a trade credit of (say) 60 days, its cash gets locked up for 60 days and reduces the working capital. It will have to borrow from open market to meet Its working capital requirement, and hence incur expenses. Similarly, if it avails of trade credit of 60 days, It has surplus cash at its disposal. It will need to borrow less money to fund operational requirements. Hence, working capital position affects the additional cost incurred by a business by way of interest on borrowing from the open market. Working capital adjustments seeks to adjust for the differences in time value of money between tested parties and potential comparables with an assumption that differences should be reflected in profits Working capital adjustment has a strong rationale in economic theory. It facilitates to increase the comparability between the tested party and comparables working in an industry which is competitive. Working capital adjustment can work out to be positive or negative. A positive working capital adjustment (WCA) will tend to reduce the arm's length PLI while a negative WCA will tend to increase the arm's length PLI.

14.We find that the facts of the Assessee's case are similar to that of the case of the Bangalore ITAT in the case of M/S.Software AG Bangalore Technologies Pvt.Ltd. and therefore we are inclined to delete the negative working capital adjustment. In determining ALP under TNMM, the correct approach would be to look at the costs incurred by the assessee only and should not impute any additional cost as done by TPO, which indirectly enhances the ALP artificially. The contrary view expressed in decision cited by the learned DR takes the view that Working capital adjustment is required in all cases as any credit extended to customers will result in cash locked up and will result in the assessee borrowing money from the banks and incur additional cost towards interest on these borrowings which cost will have effect on the price charged. It is the reasoning in these decisions that under TNM method that every ingredient of profit margins of comparable companies are analysed, whether it is positive or negative. The decision proceeds on the basis of effect on price owing to working capital requirement. We are of the view that working capital adjustment itself is computed on the basis of outstanding current assets and liabilities at the year end. It means that other things being equal, an entity having higher working capital will incur more interest cost which will reduce profitability. Hence no importance shall be given to pricing aspect. Since the assessee does not have IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 & IT(TP)A No.499/Bang/2016 M/s. Ametek Instruments India Pvt. Ltd., Bangalore any working capital risk, the question of negative working capital does not arise."

38. In view of the above, taking a consistent view, we direct the AO/TPO to not to make any negative working capital adjustment on this issue. This ground of assessee is allowed. Direct accordingly.

39. Ground Nos.15 & 16 are with regard to levy of interest u/s 234B&C of the Act, which is consequential and require no adjudication.

40. The additional grounds are only academic in nature, which does not require adjudication. We have decided on this issue in main ground itself.

41. In the result, the appeal of the assessee is partly allowed, the revenue appeal is dismissed and C.O. by assessee is dismissed as infructuous.

Order pronounced in the open court on 29th Sept, 2021 Sd/- Sd/-

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 (George George K.)                                        (Chandra Poojari)
  Judicial Member                                        Accountant Member

Bangalore,
Dated 29th Sept, 2021.
VG/SPS
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                                      IT(TP)A No.398/Bang/2016 & CO 78/Bang/2016 &
                                                          IT(TP)A No.499/Bang/2016
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M/s. Ametek Instruments India Pvt. Ltd., Bangalore Copy to:

1. The Applicant

2. The Respondent

3. The CIT

4. The CIT(A)

5. The DR, ITAT, Bangalore.

6. Guard file By order Asst. Registrar, ITAT, Bangalore.