

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.760/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

WIKA Instruments India Pvt. Ltd.,
Plot No.40, Gat No.94+100,
High Cliff Industrial Estate,
Village Kesanand,
Pune – 412207

.... अपीलार्थी/Appellant

PAN: AAACW2665A

Vs.

The Dy. Commissioner of Income Tax,
Circle 12, Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.764/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

The Dy. Commissioner of Income Tax,
Circle 12, Pune

.... अपीलार्थी/Appellant

Vs.

WIKA Instruments India Pvt. Ltd.,
Plot No.40, Gat No.94+100,
High Cliff Industrial Estate,
Village Kesanand,
Pune – 412207

.... प्रत्यर्थी / Respondent

PAN: AAACW2665A

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Rajeev Kumar, CIT

सुनवाई की तारीख / Date of Hearing : 19.03.2018	घोषणा की तारीख / Date of Pronouncement: 25.04.2018
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आदेश / ORDER**PER SUSHMA CHOWLA, JM:**

The cross appeals filed by the assessee and Revenue are against order of DCIT, Circle 7, Pune, dated 27.03.2014 relating to assessment year 2010-11 passed under section 143(3) r.w.s. 144C of Income Tax Act 1961 (in short the 'Act').

2. The cross appeals filed by the assessee and Revenue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.760/PUN/2015 has filed the following abridged grounds of appeal:-

- 1] *The learned A.O. / DRP erred in computing the Arm's Length Price (ALP) of the international transactions of exports to the AE by holding that the assessee company should have earned operating margin of around 11.76% as against 3.98% earned by the assessee company and thereby erred in making an addition of Rs.4,58,16,961/-.*
- 2] *The learned A.O./ DRP erred in holding that for the purposes of adopting the comparables, only the pneumatic segment of Shrader Duncan Ltd. should be considered as a comparable segment without appreciating that the said company should have been excluded from the list of comparable entities.*
- 3] *The learned A.O./ DRP erred in excluding Aplab Ltd. from the list of final comparable entities on the ground that the turnover of the said company had been affected due to labour strike in the company and thus, this was an exceptional year for the said company and hence, the above company could not be considered as a comparable entity.*
- 4] *The learned A.O. erred in not granting adjustment on account of working capital differences on the ground that the assessee had not produced reliable information without appreciating that all the relevant details were submitted by the assessee and hence, there was no reason to deny the adjustment on account of working capital.*

- 5] *The assessee submits that the operating margin of the assessee company considered at 3.98% by the learned A.O. is incorrect and the correct operating margin of the assessee company should be considered for determining the ALP.*
- 6] *The learned A.O./ DRP erred in making the addition by applying the net operating margin of the comparable entities to the entire turnover of the assessee company of Rs.58,85,60,456/- without appreciating that the turnover to the AEs was only Rs.16,04,47,659/- and hence, if at all, the addition was to be made, the same should have been restricted by applying the net operating margin of the comparable entities to the sales made to the AEs.*

4. The assessee has also raised an additional ground of appeal which reads as under:-

- 1] *The appellant company submits that the learned TPO erred in excluding foreign exchange gain of Rs.45,630,525/- from the operating income while determining the operating margin of the appellant company without appreciating that foreign exchange gain was part of the operating revenue and thus, the same should have been considered for determining the operating margin of the appellant company.*

5. The Revenue in ITA No.764/PUN/2015 has raised the following ground of appeal:-

1. *On the facts and in the circumstances of the case, whether the learned DRP was correct in excluding the comparable company on the basis of turnover without taking into account FAR analysis of the assessee company as well as comparable company.*

6. Briefly, in the facts of the case, the assessee had furnished return of income declaring total income of ₹ 1,36,81,299/-. The case of assessee was selected for scrutiny. Since the assessee had entered into international transactions with its associated enterprises, the Assessing Officer made reference to the Transfer Pricing Officer (TPO) under section 92CA(1) of the Act. The assessee was engaged in the activity of manufacturing and marketing of measuring instruments such as pressure gauges, pressure transmitters, chemical seals, thermometers, temperature transmitters and components and tools for refrigeration and air conditioning systems. The assessee company

mainly carried out assembly operations of the components imported from its associated enterprises. Majority of import of components of assessee company were from its parent company WIKA Germany. The TPO observed that the manufacturing activity carried on by the assessee in India related to assembly of components, welding of components, calibration and final adjustment of instruments, filling of liquid in the casing of the instrument, leakage testing by helium leak tester and final quality inspection. As per foreign collaboration agreement, WIKA Germany also provided latest technology, know-how along with designs, blue prints, layouts, etc. Calibration was the most essential part of operations in instrumentation industry, without which, the product had no acceptance. The assessee had entered into several international transactions with its different associated enterprises which are enlisted at pages 2 to 5 of the TPO's order. The assessee had aggregated the transactions and had selected TNMM method as the most appropriate method. The assessee in the TP study report had compared its aggregated margins with selected companies and found the same to be arm's length. The TPO has also aggregated various international transactions undertaken by the assessee with its different associated enterprises and had also applied TNMM method for benchmarking the transactions and there is no dispute in this regard. The TPO first observed that there were errors in computation of PLI on account of several factors and re-computed the PLI. The second exercise carried on by the TPO was vis-à-vis concerns selected by the assessee, under which the TPO excluded Aplab Ltd. The TPO had noted that there was sit down strike by the workers of the Union in the last few days of March, 2010 and as per the Memorandum of Settlement with Union, the said company had accounted sum of ₹ 50.01 lakhs and ₹ 97.32 lakhs towards employees cost. The assessee in reply, pointed out that some extraordinary

costs were incurred by the said company during the year on account of employee cost due to settlement of dues of the employees. However, the company was comparable to the assessee after making adjustments i.e. exclusion of extraordinary cost of ₹ 147.33 lakhs. The assessee also pointed out that the company was operating smoothly during the year and there was reduction of only 6.5% in turnover as compared to previous year. It was also pointed out that turnover of assessee had also reduced during the year due to poor market conditions, wherein sales during the financial year 2009-10 were ₹ 57.5 crores as compared to ₹ 63.82 crores during financial year 2008-09. However, the TPO did not accept the plea of assessee that the said concern should be retained as comparable by removing extraordinary cost, holding the relevant year to be an exceptional year for Aplab Ltd.

7. The second concern which was included by the TPO was Areva T&D India Ltd. The TPO noted that the said concern was considered as comparable by the assessee in assessment year 2009-10 and hence, the same was proposed to be included in the year under appeal also. On the other hand, the assessee contended that the said concern had failed the turnover filter criteria, wherein the turnover of the said concern for the year ending 31.12.2009 was ₹ 3724.12 crores, whereas the turnover of assessee was only ₹ 57.55 crores. The assessee contended that Areva T&D India Ltd. was very large company in all respects i.e. 64 times bigger than the assessee. Another point which was raised was that the said concern provides global solutions to industrial partners in their end for flawless energy and the main areas of business were selling project items, all types of switchgears and transformers and reactors, etc. The assessee claimed to be engaged in un-related business. However, the TPO rejected the

contention of assessee on the ground that turnover *per se* was not a comparability factor. As regards functional comparability, it was pointed out that the assessee had followed certain search criteria and from the said criteria entered in the database, assessee had selected 138 comparables and Areva T&D India Ltd. was also selected. However, the concern was rejected on the basis of turnover criteria. The TPO thus, rejecting the plea of assessee included margins of Areva T&D India Ltd. in the final set of comparables.

8. Another concern which was selected was Schrader Duncan Ltd. The case of TPO in this regard was that only pneumatic segment of the said concern was to be considered, whereas the plea of assessee was that where the said company deals in products that have pneumatic as well as automotive applications and where the assessee was also dealing in both the segments, margins of Schrader Duncan Ltd. needed to be analyzed considering both the segments together on an overall basis. The TPO noted that in the preceding year also, the issue was raised with regard to application of products in pneumatic segment of Schrader Duncan Ltd. and since the assessee was raising this issue for the first time in the year under appeal, the plea of assessee was verified by the TPO by referring to the segment-wise and product-wise details and it was held that only segmental of pneumatic were to be applied. The TPO thus, applied the margins of finally selected comparables i.e. Kaycee Industries Ltd. with OP/OC of 4.22%, Schrader Duncan Ltd. (Seg) of 19.30% and Areva T&D India Ltd. of 10.11%. The average mean margin of comparables worked out to 11.21% as against PLI of assessee at 4.14%. The TPO thus, proposed an adjustment of ₹ 4,25,79,878/-. Since the assessee had not asked for working capital adjustment in the TP study report, even with respect to comparables

selected by the assessee himself, the TPO held that the same cannot be automatically made and this plea of assessee was also rejected.

9. The Assessing Officer proposed the above said adjustment in the draft assessment order, against which the assessee filed objections before the DRP. The DRP gave certain directions i.e. first direction for exclusion of Areva T&D India Ltd. because of turnover filter. Another direction was given in respect of working of operating margins. The TPO re-worked the adjustment on the directions of DRP and addition of ₹ 4,58,16,961/- was made on account of arm's length price of international transactions.

10. The assessee is in appeal against the above said adjustment and the Revenue is in appeal against the directions of DRP.

11. Now, we shall take up the appeal filed by the assessee. The first ground of appeal raised by the assessee is general in nature and the same is dismissed.

12. The issue in ground of appeal No.2 raised by the assessee is that only pneumatic segment of Schrader Duncan Ltd. should be considered as comparable company or at best, the said company should have been excluded from the list of comparable entities. The learned Authorized Representative for the assessee pointed out that the issue of TP adjustment on similar grounds arose before the Tribunal in assessee's own case relating to assessment year 2009-10. The Tribunal in cross appeals i.e. ITA No.513/PN/2014 – appeal filed by assessee and ITA No.609/PN/2014 i.e. appeal filed by Revenue, vide order dated 29.05.2015 deliberated upon the issue of TP adjustment in the case of

assessee on account of its transactions with associated enterprises. The Tribunal vide para 32 onwards decided various facets of transfer pricing adjustment which were raised by the assessee and the Revenue in their respective appeals. The learned Authorized Representative for the assessee pointed out that the issue raised vide ground of appeal No.2 is covered by the order of Tribunal vide para 37.

13. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the orders of Assessing Officer / DRP.

14. We have heard the rival contentions and perused the record. The assessee was engaged in various activities of manufacturing and marketing of measuring instruments such as pressure gauges, pressure transmitters, chemical seals, thermometers, temperature transmitters and components and tools for refrigeration and air conditioning systems. The assessee company mainly carried out assembly operations of the components imported from its associated enterprises. Majority of import of components of assessee company were from its parent company WIKA Germany. The assessee had entered into various international transactions with its associated enterprises including import of components from its parent company i.e. WIKA Germany and also export of finished goods and manufactured components. Different international transactions were aggregated by the assessee and TNMM method was applied as most appropriate method to benchmark international transactions of the assessee. The TPO has accepted TNMM method and also the PLI worked out by the assessee in this regard. However, the dispute starts between the two i.e. assessee and Revenue vis-à-vis selection of comparables. The assessee had

selected certain comparables and had worked out that no transfer pricing adjustment had to be made in the hands of assessee on account of its various international transactions with its associated enterprises, both on account of import of components and export of manufactured items. The TPO has accepted the method employed by the assessee. However, the dispute arises as to the selection / exclusion of certain comparables being functionally comparable. One such concern which was the point of dispute between the parties was Schrader Duncan Ltd. The assessee's plea was that the margins of both automotive and pneumatic segments of said concern had to be applied in order to benchmark if the said concern was to be included in the final set of comparables, in case it not so applied, then the said concern should be excluded from final set of comparables.

15. In the preceding year, similar issue of inclusion / exclusion of Schrader Duncan Ltd. and the segmental details to be applied or not, arose before the Tribunal. After considering rival contentions and noting down the activities of the said concern, the Tribunal held vide para 37 that the said concern is to be excluded from final set of comparables while benchmarking international transactions of assessee. The relevant para reads as under:-

"37. Now, coming to alternate plea of the assessee i.e. whether the results of both the segments of Shrader Duncan Ltd. were to be considered for determining the arm's length price of international transaction. The objection of the assessee before the authorities below and also before us is whether the only segmental margins of pneumatic division of Shrader Duncan Ltd. are to be applied to benchmark the international transactions of the assessee. The case of the assessee before us was that it was engaged mainly in the manufacturing of measuring instruments, which in turn, were used in various industries, but the same were not pneumatic products. On the other hand, the comparable i.e. Shrader Duncan Ltd. was engaged in two fields i.e. automotive industry and pneumatic industry. The assessee admits that in its TP study, Shrader Duncan Ltd. was selected as a comparable as it was mainly engaged in the manufacture of hydraulic / pneumatic equipments, truck and passenger wheels and other auto accessories. Considering the similarity in the products, the company was selected as a comparable. In the final selection also, the said company was selected as a comparable as it was engaged mainly in manufacture of hydraulic /

pneumatic equipments, truck and passenger wheels and other auto accessories. In the TP study, 'pneumatic' was never used as a filter, but gauge has used a filter and both the assessee and Shrader Duncan Ltd. were manufacturing gauges and Shrader Duncan Ltd. was manufacturing gauges in automotive sector. The perusal of financial statements of Shrader Duncan Ltd. at page 271 of the Paper Book enlists the list of products manufactured by it and except for tyre pressure gauges, the other gauges are not in comparison. The list of quantitative details reflect Shrader Duncan Ltd. to have manufactured valve caps, passenger and truck valves, rim nets, tyre pressure gauges, other accessories including repressing bicycle valves. The main activity undertaken by Shrader Duncan Ltd. was in manufacture of hydraulic and pneumatic equipments. In addition, the said company was also engaged in the trading of hydraulic and pneumatic equipment and coats. As explained by the learned Authorized Representative for the assessee, manufacture of tyre pressure gauges was in the automotive sector. Our attention was further drawn to the list of products manufactured by the said company which are available on the website of Shrader Duncan Ltd. The learned Authorized Representative for the assessee pointed out that under the head pneumatic, products manufactured were at complete variance with the products of assessee. The perusal of financial statements of the said company and the list of items manufactured by the said company reflect that the products manufactured by the said company are completely at variance with the products manufactured by the assessee and even if we take that the manufacture of tyre pressures gauges is comparable to the products manufactured by the assessee, but the quantum of the said items manufactured by Shrader Duncan Ltd. was at very low level. In the entirety of the above said facts and circumstances, we are of the view that the said company i.e. Shrader Duncan Ltd. is functionally dissimilar to the assessee and consequently, the margins shown by the said company cannot be applied in order to benchmark the international transaction of the assessee. For benchmarking the international transaction of the assessee, it is paramount that the comparables which are selected should be functionally similar and in case the same are not functionally same, the said company cannot be picked up as a comparable. Such was the ratio laid down by Special Bench of Chandigarh Tribunal in DCIT Vs. Quark System Pvt. Ltd. (2010) 132 TTJ Chd (SB) (1). Another aspect of the issue is that where the assessee himself had picked up certain companies in its list of comparables, can the same be excluded from the final list of comparables. Similar issue arose before Special Bench of Chandigarh Tribunal in DCIT Vs. Quark System Pvt. Ltd. (supra), wherein it was held that the taxpayer cannot be estopped from pointing out a mistake in the assessment though such mistake was a result of evidence adduced by the taxpayer. Following the same parity of reasoning, we hold that the said company Shrader Duncan Ltd. is to be excluded from the final list of comparables while benchmarking international transactions of the assessee. Accordingly, we direct so. The grounds of appeal Nos.3 to 5 raised by the assessee are thus, allowed."

16. The issue arising in the present appeal before us vide ground of appeal No.2 is similar to the issue before the Tribunal in assessee's own case in the preceding year and following the same parity of reasoning, we hold that the said concern is to be excluded from final set of comparables.

17. The next concern which was selected by the TPO was Areva T&D India Ltd. The case of assessee was that the said concern fails the turnover filter as the said concern was very big company as compared to the assessee. The turnover of assessee for the year under consideration was ₹ 57.55 crores, whereas the turnover of Areva T&D India Ltd. was ₹ 3724.12 crores. The TPO had selected the said concern but the DRP had directed the exclusion of said concern from final list of comparables. We find that the Tribunal in assessee's own case in preceding year had upheld the order of DRP in excluding Areva T&D India Ltd. from final set of comparables. The relevant observations of the Tribunal are vide para 33, which reads as under:-

“33. One addition made by the TPO was with regard to Areva T & D India Ltd. The said company was selected as comparable being in the field of line of business. However, the assessee objected to the selection of the said company, which in turn, had higher turnover of Rs.2826 crores. While searching for comparables during the compilation of its TP study, admittedly, the said company was part of search criteria of the assessee, but the same was excluded on application of turnover filter of companies having sales turnover more than 600 crores. It may be pointed out that total turnover of the assessee for the year under consideration was Rs.63 crores. Another dissimilarity pointed out by the assessee was that even on product basis, there was no similarity. The TPO on the one hand included the said company as comparable, whereas the DRP has excluded the said company from the list of comparables. The perusal of financial statements of Areva T & D India Ltd. reflect that it is engaged in power transmission and distribution business and deals in products such as circuit breakers, transmitters, switch gears, distribution, transformers, etc. The said company was in designing, manufacturing and installing complete range of high and medium voltage products and also secondary distribution equipment for the electricity transmission and distribution networks. On the other hand, the assessee was engaged in the activity of manufacturing and marketing of measuring instruments. The assessee was engaged in the assembly operations of components imported from its AEs and the activity involved assembly of components, building of components, calibrations and final adjustment of instruments, etc. The comparisons of the business carried on by the assessee and that carried on by Areva T & D India Ltd. reflects that the same are not comparables. Where the business of the selected company is not comparable with that of the tested company, then the same cannot be picked up as a comparable, as the results shown by such company cannot be matched with the results of tested company, to work out whether the international transaction carried on by the tested party is at arm's length price. The assessee had applied turnover filter of Rs.600 crores and all the companies whose turnover was more than Rs.600 crores were excluded. The margins of Areva T & D India Ltd. with turnover of Rs.2800 crores cannot be compared with the margins of the assessee company, whose total turnover for the year under consideration was Rs.63 crores. In the totality of the above said facts and circumstances, we hold that the TPO had erred in selecting Areva T & D India Ltd. as a comparable while

benchmarking the international transaction of the assessee. Upholding the order of DRP in this regard, we dismiss the grounds of appeal raised by the Revenue.”

18. The issue which is arising before us is thus, squarely covered by the order of Tribunal in assessee's own case in preceding year and following the same parity of reasoning, we find no merit in the grounds of appeal raised by the Revenue.

19. Another factor which has been applied by TPO is the revised PLI of company Areva T&D India Ltd. as against PLI declared by the company on calendar year basis. Before the TPO, the assessee had filed the submissions and it has been pointed out that the year ending for the said concern was 31.12.2009 and the financial year for the assessee ends as on 31.03.2010. We thus, hold that where the concern has different accounting period than the accounting period of assessee, then the said concern cannot be picked up as comparable, in view of the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. PTC Software (I) Pvt. Ltd. in Income Tax Appeal No.732 of 2014, judgment dated 26.09.2016. Thus, the ground of appeal raised by the Revenue is dismissed.

20. Now, coming to the next issue raised by the assessee vide ground of appeal No.3, wherein the assessee is aggrieved by exclusion of Aplab Ltd. from the final list of comparables. The said concern was accepted as functionally comparable but the same was excluded because of labour unrest for about 7-8 days in the month of March. The plea of assessee before us is that the said strike of about 8 days had hardly affected the turnover of said concern, wherein the turnover for the year under consideration was ₹ 97.95 crores as against

₹ 104.73 crores declared by the said concern in the earlier year. Our attention was drawn to the financials of said concern placed at page 195 of Paper Book. The learned Authorized Representative for the assessee further referred to the turnover of assessee, wherein the same stands reduced from ₹ 63.82 crores to ₹ 57.55 crores due to general recession in the market. The learned Authorized Representative for the assessee pointed out that the Delhi Bench of Tribunal in Honda Motorcycle & Scooters India (P.) Ltd. (2015) 56 taxmann.com 237 (Delhi – Trib.) had held that no adjustment to operating margins is to be allowed because of strike of employees. The learned Authorized Representative for the assessee further referred to the observations of DRP at page 38 of Appeal Memo, wherein it was observed that 8 days strike do not make any impact on the operations. The learned Authorized Representative for the assessee stressed that the strike related expenses can be excluded while working out the margins of said concern.

21. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the orders of authorities below.

22. We have heard the rival contentions and perused the record. The issue vide ground of appeal No.3 is against rejection of Aplab Ltd. on the ground of extraordinary event by the TPO, which has been confirmed by the DRP. The assessee had selected Aplab Ltd. as functionally comparable and there is no dispute to the fact that the said concern was functionally comparable to the assessee. However, during the last few days of March, 2010, there was sit down strike by the workers of Union, which ended up as per Memorandum of Settlement with the Union. The said concern paid ₹ 50.01 lakhs and ₹ 97.32 lakhs relating to the period of six months of financial year 2008-09 and 12

months of financial year 2009-10, respectively, towards employee cost. The assessee stressed that the adjustment can be made to the PLI by exclusion of extraordinary cost and once it is so excluded, the comparability of the said company with the assessee is at par. The perusal of financials of said concern reflects that the operations have been carried on by the said concern for the year and even the turnover of the said concern has not been affected because of the strike by the employees. The total turnover for the year shown by Aplab Ltd. was ₹ 97.95 crores as against ₹ 104.73 crores declared in the preceding year. In comparison, the turnover of assessee for the year under consideration was ₹ 57.58 crores as against ₹ 63.682 crores declared in the preceding year. The decline in the turnover was claimed to be because of general recession in the market.

23. The question which arises is whether the event of strike of 8 days would make it an extraordinary event justifying the exclusion of the said concern from the final list of comparables, where the concern was selected and adopted as comparable in the preceding year. We find merit in the plea of assessee in this regard and hold that the margins of said concern be applied to benchmark international transactions of the assessee with its associated enterprises. However, we direct the Assessing Officer to exclude cost of ₹ 147.33 lakhs while working out the margins of said concern to be applied in order to determine mean margins of comparables. The Assessing Officer shall re-work the margins in line with our directions and compute the mean margins of comparables accordingly and determine the arm's length price of international transactions. Accordingly, the ground of appeal No.3 raised by the assessee is allowed.

24. The issue raised vide ground of appeal No.4 is against non-allowability of working capital adjustment.

25. The learned Authorized Representative for the assessee here pointed out that the DRP in para 2.4 had directed the Assessing Officer / TPO to allow working capital adjustment but the Assessing Officer / TPO have failed to follow the directions of DRP. Accordingly, we direct the Assessing Officer / TPO to comply with directions of DRP and allow working capital adjustment in accordance with law and the settled legal position on the issue and work out the adjustment on account of arm's length price. We also find that similar issue of non-allowance of adjustment on account of working capital adjustment arose in assessment year 2009-10 and the Tribunal vide para 40 directed the Assessing Officer to re-compute the working capital adjustment in the hands of assessee. Accordingly, the ground of appeal No.4 raised by the assessee is allowed.

26. Now, coming to the issue raised vide ground of appeal No.5 i.e. computation of correct operating margins of assessee.

27. The learned Authorized Representative for the assessee in this regard pointed out that commission income was earned from associated enterprises by using the employees and in earlier year also, the said commission income was part of operating revenue, hence there was no reason to deviate and exclude the said commission income from PLI. The plea of assessee that commission income earned from associated enterprises was earlier included as part of operating revenue, needs verification at the end of Assessing Officer / TPO. Though the principles of *res judicata* are not applicable to the Income Tax proceedings but in case the facts and circumstances are similar, then there is no

reason to deviate from the stand taken in earlier year. The Assessing Officer is directed to verify the plea of assessee and in case the stand of Revenue is to include commission income as part of operating revenue in earlier years, then the same merits to be included during the year under consideration also. The Assessing Officer shall afford reasonable opportunity of hearing to the assessee and compute the operating revenue accordingly.

28. The issue raised in ground of appeal No.6 raised by the assessee is against transfer pricing adjustment made on entity level.

29. The plea of assessee before us is that the issue has been settled by the Hon'ble Bombay High Court in CIT Vs. Thyssen Krupp Industries India P. Ltd. (2016) 381 ITR 413 (Bom), wherein the transfer pricing adjustment, if any, has to be made vis-à-vis associated enterprises transactions and not on entity level. The learned Authorized Representative for the assessee referred to the order of TPO and pointed out that transactions with associated enterprises were to the tune of ₹ 16.04 crores, whereas the Assessing Officer had taken the entire turnover of ₹ 58.85 crores as basis for working out transfer pricing adjustment. We find this issue is squarely covered by the ratio laid down by Hon'ble Bombay High Court in CIT Vs. Thyssen Krupp Industries India P. Ltd. (supra), wherein it has been held that adjustment, if any, on account of transfer pricing provisions is to be made to the associated enterprises segment only and not on entity level. Accordingly, we direct the Assessing Officer / TPO to re-compute the arm's length price of international transactions of assessee with its associated enterprises on the basis of transactions with associated enterprises only and not

on entity level. The ground of appeal No.6 raised by the assessee is thus, allowed.

30. The assessee has raised an additional ground of appeal for allowing adjustment on account of foreign exchange fluctuations.

31. The learned Authorized Representative for the assessee pointed out that all the facts in this regard were available on record and in view of the dictate of the Hon'ble Supreme Court in National Thermal Power Co. Ltd. Vs. CIT (1998) 229 ITR 383 (SC), the said adjustment on account of foreign exchange be allowed in the hands of assessee. The learned Authorized Representative for the assessee relied on the decision of Pune Bench of Tribunal in Approva Systems (P.) Ltd. Vs. CIT (2015) 54 taxmann.com 81 (Pune – Trib).

32. We find that the additional ground of appeal raised by the assessee is purely legal in nature and the same is admitted for adjudication. The assessee is aggrieved by non-allowance of adjustment on account of foreign exchange gain. The issue stands settled by various decisions of Tribunal that foreign exchange fluctuation cannot be excluded from computation of operating margins of assessee company.

33. Similar is the proposition laid down by the Pune Bench of Tribunal in Approva Systems (P.) Ltd. Vs. CIT (supra), which in turn, relied on series of decisions of different Benches of Tribunal as mentioned in para 22 of the said order. Following the same parity of reasoning, we direct the Assessing Officer to consider the foreign exchange fluctuation as part of operating revenue of

assessee after verification of the claim of assessee, for which reasonable opportunity of hearing shall be given to the assessee. Hence, the additional ground of appeal raised by the assessee is thus, allowed.

34. In the result, appeal of assessee is allowed and appeal of Revenue is dismissed.

Order pronounced on this 25th day of April, 2018.

Sd/-

(D.KARUNAKARA RAO)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(SUSHMA CHOWLA)

न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 25th April, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रहित/Copy of the order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune