

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'A' BENCH : BANGALORE**  
**BEFORE SHRI. B.R BASKARAN, ACCOUNTANT MEMBER**  
**AND**  
**SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>ITA No.656/Bang/2016</b>
<b>Assessment Year : 2011-12</b>

Infineon Technologies India Pvt. Ltd., 9 <sup>th</sup> Floor, Prestige Thirulakshmi, No.11, Mahatma Gandhi Road, Bengaluru-560 001.  <b>PAN - AABCS 6967 N</b>	<b>Vs.</b>	The Asst. Commissioner of Income-Tax, Circle-3(1)(1), Bengaluru.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Revenue by	:	Ms. Neera Malhotra, CIT-DR
Assessee by	:	Shri Sharath Rao, C.A

Date of Hearing	:	24-03-2021
Date of Pronouncement	:	07-04-2021

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal has been placed before us pursuant of order dated 19/10/2020 passed in MP No.96/Bang/2020. Assessee had filed MP No.96/Bang/2020 in order dated 19/3/2020 passed by this Tribunal, as inadvertently, inclusion of two comparables alleged by assessee and ground challenging negative WCA were not adjudicated therein. This Tribunal in order dated 19/10/2020 passed in MP No.96/Bang/2020 has recalled order

dated 19/3/2020 only to the extent for adjudicating following issues:

- Ground No 12.2.: The assessee is requesting that following companies should be included in the final list of comparables although DRP suo moto directed for their exclusion:—

(a) Evoke Technologies Ltd

(b) Think soft Global Ltd

- Ground No.14.a. computing negative working capital adjustment and proposing restriction of working capital adjustment.

2. We therefore adjudicate the above issues as under:

**3. Ground no 12.2:** Ld AR submitted that inclusion of 2 comparables are supported by the decision rendered by co-ordinate bench of *Tribunal* in the case of:

(i) *AMD India (P.) Ltd. v. Asstt. CIT [IT (TP) A No. 1487 (Bang.) of 2015, dated 6-4-2017*

(ii) *Applied Materials India (P.) Ltd. v. Asstt. CIT [IT (T.P.) A No. 17 (Bang.) of 2016, dated 21-9-2016]*

(iii) *Sterling Commerce Solution India Ltd Vs.DCIT in IT(TP)A No.1410/Bang/2015 by order dated 26/02/2020*

(iv) *LSI India Research & Development India Ltd vs. DCIT in IT(TP)A No.704/Bang/2016 by order dated 16/10/2020*

*M/s.Huawei Technologies India Pvt.Ltd in ITA No.150/Bang/2016 by order dated 16/12/2020*

**Evoke Technologies Ltd:**

*It was submitted by the Id. AR that because of the margins are low, it cannot be excluded from the list of comparables. For this purpose, he relied on the order of Bangalore Bench of Tribunal in the case of Sterling Commerce Solutions India Pvt. Ltd. Vs. DOT (IT(TP)A No. 141 O/Bang/20 15 Dt.26.02.2020).*

*6.5 We have heard the rival contentions, perused and carefully considered the material on record. We find merit in the argument of id.*

*AR. In view of the order of the co-ordinate Bench of this Tribunal in the case of Sterling Commerce Solutions India Pvt, Ltd, Vs. DCIT (supra) in paras 7 & 8 held as under:*

*7. As far as the appeal of the Assessee is concerned, on the issue with regard to inclusion of Evoke Technologies Pvt.Ltd., as comparable company, the admitted factual position is that both the Assessee and the Revenue want its inclusion. The Assessee had chosen this company as comparable company in its TP study and the TPO accepted this company as comparable company. The DRP suo motto excluded this company from the list of comparable companies. The reasons assigned by the DRP for excluding this company was (i) that the margin of this company was abnormally low as compared to other comparable companies and (ii) Expenses on consultancy charges increased by 1,118% which indicated that the low margins during the relevant period was due to peculiar circumstances. It is the plea of the Assessee before us that this company is functionally comparable as it was also a SWD service provider and that low margins cannot be the basis to exclude this company. It was submitted that the DRP has not spelt out as to how increase in consultancy charges resulted in peculiar circumstances prevailing in the case of this company. Our attention was drawn to a decision of the ITAT Bangalore in the case of MiSApplied Materials India Pvt. Ltd. IT(TP) A.No.17/Bang/2016 & IT(TP)A.No.39/Bang/2016 order dated 21.9.2016 for AY 2011-12 wherein this company was regarded as comparable and include as comparable. The learned DR relied on the order of the DRP.*

*8. We are of the view that the reasons for exclusion of this company are not sound. When both the Assessee and the revenue seek inclusion of this company, there was no valid basis for the DRP to suo motto exclude this company from the list of comparable companies. In the decision cited by the learned counsel for the Assessee in the case of a SWD service provider such as the Assessee, this company was held to be a valid comparable company and included in the list of comparable companies. We therefore direct inclusion of this company in the list of comparable companies."*

*In view of the above decision of Tribunal, we allow the ground taken by the assessee. We direct the Assessing Officer/TPO to include this company in the list of comparables."*

4. Respectfully, following this Tribunal order and in view of the appeal of both sides for inclusion of these three companies in the final list of comparables, we direct the AO/TPO to include these three companies in the final list of comparables.

**Think soft Global Ltd**

5. This company was selected by the assessee as a comparable in its TP study. The Ld.TPO rejected this company as a comparable on the ground that it is functionally different and is not into provision of software development services, as the annual report indicates that it is into software validation and verification services and further it would not have incurred expenditure on sales commission if it was into provision of software development services. It was also rejected on grounds of failing the Foreign Exchange filter. According to the Ld. AR, this company is engaged in provision of software development services to the banking and financial services and is therefore functionally comparable to the assessee. It is further submitted that the assessee passes the forex filter being at 91.21% of sale. It is also contended that in immediately preceding year i.e. Assessment Year 2010-11; the TPO has accepted this company and included this in the final set of comparables.

6. On the contrary, the Ld.CIT DR supported the orders of the authorities below in excluding this company from the final set of comparables.

7. We have heard the rival contentions and perused and carefully considered the material on record. On a perusal of the Annual Report of the assessee (placed at pages 99-178 of the Paper Book), it is seen that the business profile of this company in the year under consideration, remains the same as in the immediately preceding Assessment Year 2010-11; wherein it has been classified as a provider of software development services to

financial and banking industry and was included by the Ld.TPO in his final set of comparables. Though the Ld.TPO stated that the assessee is not in into provision of software development services; except for stating so, no evidence to this effect has been on record to establish how it is functionally different from the assessee. It is also seen from the Annual Report that the assessee (page 140 of Paper Book) that the assessee passes the foreign revenue filter having 91.21%, export sales of Rs. 55.92 crores out of total sales of Rs. 61.31 Crores. The TPO's observation that since the assessee incurs expenditure of Rs. 45.58 lakhs on sales commission, it is not into provision of software development services is not borne out or supported by any fact to that effect being brought by the Ld.TPO on record. We also observe that the expenditure incurred on sales commission was Rs. 89.86 lakhs in the immediately preceding year and the Ld.TPO still held it to be into provision of software development services and a good comparable to the assessee. In the facts of the case as discussed above, we are of the opinion that the authorities below have not made out a case for rejection of this company as a comparable as it is evidently clear from the Annual Report that it provides software development services to its clients, just as the assessee in the case on hand is a software service provider.

8. We, therefore, direct the TPO/AO to include this company in the final set of comparables for computing the ALP of the assessee's international transactions in software development services.

**Accordingly, Ground no.12.2. sands allowed.**

**Ground No.14.b**

9. The other ground that remained for adjudication is with regard to negative working capital adjustment carried out by the Ld.TPO which was confirmed by the DRP. It is the plea of the assessee that though the TPO has observed that the Assessee has a healthy margin, the Ld.TPO has erred in making an adjustment towards working capital and the DRP further erred in upholding the same.

10. It was submitted that Working capital adjustment is made for the time value of money lost when credit time is given to the customers. The Assessee however does not bear any risk and has no working capital contingencies. The Assessee has not incurred any expenses for meeting the working capital requirement. The Assessee is running the business without any working capital risk as compared to the comparables. The Assessee does not bear any market risk as the services are provided only to the AE. Therefore, requirement for adjustment of negative working capital does not arise.

11. The Ld.AR placed reliance on *Tivo Tech (P.) Ltd. v. Dy. CIT* (2020) 117 taxmann.com 259, *LamResearch India (P.) Ltd. v. Dy. CIT* in ITA Nos.1473&1385/Bang./2014, dated 30-4-2015 and *Dy. CIT v. Software AG Bangalore Technologies (P.) Ltd.* in ITA No.1628 of 2014, dated 31-3-2016 passed by this *Hon'ble Tribunal*, where it has been held that negative working capital adjustment shall not be made.

12. We have considered the rival submissions. We find that in the case of *LamResearch India (P.) Ltd. (supra)* and *Software AG Bangalore Technologies (P.) Ltd. (supra)* passed by this Tribunal, it has been 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. Following these decisions, we allow ground No.14.b raised by the assessee.

Thus the Ld.TPO is directed to compute the ALP in accordance with the directions contained in this order after affording assessee opportunity of being heard.

**Accordingly, this ground raised by assessee stands allowed.**

Order pronounced in the open court on 7<sup>th</sup> April, 2021

Sd/-  
(B.R BASKARAN)  
Accountant Member  
Bangalore,  
Dated, the 7<sup>th</sup> April, 2021.  
/Vms/

Sd/-  
(BEENA PILLAI)  
Judicial Member

**Copy to:**

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar, ITAT, Bangalore

		<b>Date</b>	<b>Initial</b>	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-4-2021		Sr.PS
3.	Draft proposed & placed before the second member	-4-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-4-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-4-2021		Sr.PS/PS
6.	Kept for pronouncement on	-4-2021		Sr.PS
7.	Date of uploading the order on Website	-4-2021		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-4-2021		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS