IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI 'J' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Amarjit Singh (Judicial Member)]

ITA No.: 614/M/2021
Assessment year: 2016-17

Majesco Software and Solutions India Private Ltd., **……………...………..Appellant**
P-136 MNDC, Miilenium Business Park, Mahape
Navi Mumbai 400710 [PAN: AAJCM5178K]

Vs

Additional Commissioner of Income Tax, (DRP)
Mumbai. **……………..….......Respondent**

<u>Appearances by</u>

Dr. CA Sunil Lala, *for the appellant*
Manpreet S. Duggle *for the respondent*

Date of concluding the hearing: : June 06, 2021
Date of pronouncement : August 30, 2021

<u>O R D E R</u>

<u>Per Pramod Kumar, VP:</u>

1. By way of this appeal the assessee-appellant has challenged correctness of the order dated 26th March 2021 passed by the learned Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Grievances of the appellant are as follows:-

> *1. On the facts in the circumstances of the case and in law, the order passed by the Additional/Joint/Deputy/Assistant Commissioner of Income Tax/Income Tax-Officer, National e-Assessment Centre Delhi, [hereinafter referred to as Learned Assessing Officer ('A.O')], the directions issued by the Hon'ble Dispute Resolution Panel ('DRP') and the order passed by the learned Transfer Pricing Officer ('TPO') are bad in law and liable to be quashed as they are not in accordance with law.*

2. On the facts and in circumstances of the case and in law, the Hon'ble DRP, the learned AO and the learned TPO erred in determining the total income of the Appellant at INR 54,11,52,600 as against the revised returned income of INR 2,26,05,600 consequent to a Transfer pricing adjustment/addition of Rs. 51,35,47,000 and the said adjustment/addition being wholly unjustifiable is liable to be set aside.

3. On the facts and in the circumstances of the case and in law, the Hon'ble DRP/learned AO/ learned TPO erred in disregarding the transfer pricing study report maintained by the Appellant in relation to provision of software services as per section 92D of the Income Tax Act 1961 ('the Act') read with rule 10D of the Income Tax Rules, 1962.

4. On the facts and in the circumstances of the case and in law, the Hon'ble DRP/ learned AO/ learned TPO have erred in making an adjustment of INR 51,35,47,000 in relation to the international transaction of provision of software services (distribution of software services by the AEs) by erroneously treating the Appellant as the tested party instead of treating the AEs as the tested party.

5. On the facts and in the circumstances of the case and in law, the learned DRP/learned AO further erred in not appreciating that the Appellant's case is squarely covered by the Hon'ble Income Tax Appellate Tribunal, Mumbai ('Mumbai ITAT') decision in Appellant's own case for the AY 2015-16, wherein the use of Foreign AE's as tested party, being less complex than the Appellant, was upheld by the Hon'ble Mumbai ITAT and entire transfer pricing adjustment was deleted.

6. On the facts in circumstances of the case and in law, the learned AO/TPO erred in making the transfer pricing adjustment/addition disregarding the fact the L&A business of the Appellant had incurred overall losses in the year under consideration. The Hon'ble DRP further erred in upholding the action of the learned AO/learned TPO.

7. On the facts in circumstances of the case and in law, the learned DRP/TPO erred in violating the principles of natural justice and drawing factually incorrect inferences without appreciating the submissions and documentary evidence filed by the Appellant. The Learned DRP/TPO further erred in relying on case laws which are not applicable to the case of the Appellant instead of following the precedents in the Appellant's own case.

3. When this appeal came up for hearing, learned counsel for the assessee pointed out that the core issue in this appeal is whether or not the authorities below are justified in declining assessee's claim that the foreign AE's concerned, being less complex entities, should be treated as tested parties. He further submits that this issue is squarely covered, in favour of the assessee, by a coordinate bench decision in assessee's opwn case for the immediately preceding assessment year, i.e. 2015-16. He then takes us through certain observations in the order passed by Dispute Resolution Panel which confirms that all the material facts of the case are *pari materia* with the assessment year 2015-16. On these submissions, learned counsel urges us to uphold the grievances of the appellant, and delete the impugned ALP adjustment.

4. Learned Departmental Representative submits that, in principle, the foreign AE's, when least complex, can be treated as tested parties. However, he submits that in this case the assessee has taken contradictory stand while dealing with other segments. Our attention is then invited to the observations made by the DRP, refereeing to certain agreements, to the effect that no credence can be given to the recitals in these agreements. He, however fairly admits that the facts of the present year and the assessment year 2015-16, even as he reiterates the observations of the D.R.P. on the reasons rejecting claim of the assessee and relying upon directions report of the AEs. It is submitted that there is no *res judicata* in tax proceedings, and we must adjudicate the issue on merits.

5. Having heard the rival contentions and having perused the material on record, we see no reasons to take any other view of the matter than the view takes, on same set of facts, by the coordinate bench for the assessment year 2015-16. Vide order dated 102th November 2020, the coordinate bench has observed as follows:-

> *24. Having considered various decisions favouring selection of foreign entities as tested party, it would be apposite to point here that there are some contrary decisions of the Tribunal rejecting the concept of foreign AE being selected as 'tested party' in Transfer Pricing study. The ld. DR has referred to one such decision rendered in the case of Carraro India Pvt. Ltd. vs. DCIT (supra). In the said decision the Tribunal observed that selection of foreign AE as Tested Party does not have statutory sanction. We find that in afore said case perhaps, United Nations Manual on Transfer Pricing was not brought to the notice of Bench, hence the Bench was unaware of the view of Indian Tax Administration authorities accepting foreign entities as tested party. In the decisions favouring selection of Tested Party, OECD guidelines as well as the United Nations Manual on Transfer Pricing for developing nations were considered.*
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> *The other decision on which ld. DR has placed reliance is in the case of Nivea India Pvt. Ltd. (supra). We find that in the said case, the issue has been decided on the facts of the case. The assessee therein failed to substantiate that foreign entity is less complex. The Tribunal in principle has not rejected selection of foreign AE as tested party. Hence, both the decisions relied by ld. DR are distinguishable.*
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> *25. In the present case assessee's parent company from which the assessee has acquired offshore insurance activities selected foreign AEs as tested party in its Transfer Pricing study to determine arm's length price of the international transaction. As has been pointed earlier, the Revenue accepted selection of foreign AEs as tested party in the case of assessee's parent company i.e. Mastek Ltd. After demerger of offshore insurance business by Mastek Ltd. to Majesco Ltd. the said company for the intervening period i.e. the period before offshore insurance business was finally transferred to assessee by way of slump sale, Majesco carried offshore insurance product and service activities. Majesco Ltd. also selected foreign AEs as tested party and the same was accepted by the Revenue. Undisputedly, there has been no change in the business acquired by the assessee from the parent company through Majesco Ltd. We see no valid reason to take a different view for rejecting foreign AEs as tested party, when there is no change in the terms and conditions of agreement with AEs and nature and manner of business. It is not the case of Revenue that the*

> *assessee has not been able to establish that functional analysis of foreign AEs least complex and there are no reliable comparables. 26. In the light of factsof the case, OCED guidelines, United Nations Manual on Transfer Pricing and various decisions referred above, we find merit in the submissions made by ld. Authorized Representative for the assessee for selecting foreign AEs as tested party in the impugned assessment year. Consequently, the assessee succeeds on ground No.4 of the appeal. functional analysis of foreign AEs least complex and there are no reliable comparables.*
>
> *26. In the light of facts of the case, OCED guidelines, United Nations Manual on Transfer Pricing and various decisions referred above, we find merit in the submissions made by ld. Authorized Representative for the assessee for selecting foreign AEs as tested party in the impugned assessment year. Consequently, the assessee succeeds on ground No.4 of the appeal.*

6. Respectfully following esteemed views of the co-ordinate, bench we hold that the assessee was justified in taking foreign AEs, as the tested parties. The authorities below were therefore not justified in rejecting this approach, and making the impugned ALP adjustment of Rs. 51,35,47,000/- The assessee gets the relief accordingly.

7. In the result, the appeal is allowed. Pronounced in the open court today on 30th day of August, 2021.

Sd/- **Amarjit Singh** (Judicial Member)	`	**Sd/-** **Pramod Kumar** (Vice-President)

Dated: 30th day of August, 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai