[2021] 126 taxmann.com 249 (Mumbai - Trib.)[12-11-2020]

TRANSFER PRICING : When revenue accepted selection of foreign AEs as tested party in case of assessee's parent company and there was no change in business acquired by assessee from parent company or any difference in terms and conditions of agreement with AEs or nature and manner of business conducted by assessee, then there is no valid reason to take different view for rejecting foreign AEs as tested party

[2021] 126 taxmann.com 249 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'J'

Majesco Software and Solutions India (P.) Ltd.

v.

ACIT*

VIKAS AWASTHY, JUDICIAL MEMBER
AND N.K. PRADHAN, ACCOUNTANT MEMBER
IT APPEAL NO. 7070 (MUM.) OF 2019
[ASSESSMENT YEAR 2015-16]
NOVEMBER 12, 2020

I. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - Insurance services) - Assessment year 2015-16 - Assessee's parent company from which assessee acquired offshore insurance activities selected foreign AEs as tested party in its Transfer Pricing study to determine ALP of international transaction - Revenue accepted selection of foreign AEs as tested party in case of assessee's parent company - After demerger of offshore insurance business by Parent company to assessee, assessee carried offshore insurance product and service activities and selected foreign AEs as tested party and same was accepted by revenue - However, TPO accepted foreign AEs as Tested Party for which parent company was carrying business but for remaining period TPO declined to accept foreign AEs as Tested Party - Whether since there was no change in business acquired by assessee from parent company or any difference in terms and conditions of agreement with AEs or nature and manner of business conducted by assessee, then there is no valid reason to take different view for rejecting foreign AEs as tested party - Held, yes [Para 25] [In favour of assessee]

CASE REVIEW

Ranbaxy Laboratories Ltd. v. *Addl. CIT* [2008] 167 Taxman 30/110 ITD 428 (Delhi) (para 20) and *General Motors India (P.) Ltd.* v. *Dy. CIT* [2013] 37 taxmann.com 403/[2014] 146 ITD 559 (Ahd. – Trib.) (para 21) *followed.*

Carraro India (P.) Ltd. v. *Dy. CIT* [2019] 104 taxmann.com 166 (Pune - Trib) and *Nivea India (P.) Ltd.* v. *Asstt. CIT* [2018] 92 taxmann.com 165 (Mum. - Trib.) (para 24) *distinguished.*

CASES REFERRED TO

Landis Gyr Ltd. v. *Dy. CIT* [IT Appeal No. 37 (Kol.) of 2012, dated 3-8-2016] (para 6), *IDS Infotech Ltd.* v. *Dy. CIT* [2017] 80 taxmann.com 88/[2017] 189 TTJ 606 (Chd. – Trib.) (para 6), *Asstt. CIT* v. *IDS Infotech Ltd.* [IT Appeal No. 442 (Chd.) of 2018, dated 4-2-2019] (para 6), *TNT India (P.) Ltd.* v. *Asstt. CIT* [IT Appeal Nos. 1443 & 1444 (Bang.) of 2008, dated 3-11-2016] (para 6), *CWT India (P.) Ltd.* v. *Asstt. CIT* [2019] 109 taxmann.com 182 (Mum. - Trib.) (para 6), *Sutherland Healthcare Solutions Ltd.* v. *ITO* [2017] 77 taxmann.com 352 (Hyd. – Trib.) (para 6), *Almatis Alumina (P.) Ltd.* v. *Dy. CIT* [2019] 107 taxmann.com 305 (Kol. – Trib.) (para 6), *Ranbaxy Laboratories Ltd.* v. *Dy. CIT* [IT (TP) Appeal No. 1782 (Delhi) of 2014, dated 5-9-2019] (para 6), *Dy. CIT* v. *Mastek Ltd.* [IT Appeal No. 2879 (Ahd.) of 2014, dated 19-3-2018] (para 7), *Carraro India (P.) Ltd.* v. *Dy. CIT* [2019] 104 taxmann.com 166 (Pune – Trib.) (para 8), *Nivea India (P.) Ltd.* v. *Asstt. CIT* [2018] 92 taxmann.com 165 (Mum. – Trib.) (para 8), *General Motors India (P.) Ltd.* v. *Dy. CIT* [2013] 37 taxmann.com 403/[2014] 146 ITD 559 (Ahd. – Trib.) (para 10), *ITO* v. *WNS Global Services (P.) Ltd.* [IT Appeal No. 2318 (Mum.) of 2009, dated 4-5-2018] (para 10), *Yamaha Motors India (P.) Ltd.* v. *Asstt. CIT* [2014] 50 taxmann.com 444/151 ITD 731 (Delhi – Trib.) (para 10), *Development Consultants (P.) Ltd.* v. *Dy. CIT* [2008] 23 SOT 455 (Kol.) (para 10), *Ranbaxy Laboratories Ltd.* v. *Addl. CIT* [2008] 167 Taxman 30/110 ITD 428 (Delhi) (para 20), *GKN Driveline (India) Ltd.* v. *Dy. CIT* [IT Appeal No. 278 (Delhi) of 2017, dated 28-3-2018] (para 22) and *Suzlon Energy Ltd.* v. *Asstt. CIT* [2017] 81 taxmann.com 190/188 TTJ 278 (Ahd. – Trib.) (para 27).

Dr. Sunil M. Lala *for the Appellant.* **A. Mohan** *for the Respondent.*

ORDER

Vikas Awasthy, Judicial Member. - This appeal by the assessee is directed against the assessment order dated 26-10-2019 passed under section 143(3) r.w.s. 144C(3) of the Income-tax Act, 1961 (in short 'the Act').

2. Dr. Sunil Moti Lala, appearing on behalf of the assessee, narrating the facts and background of the assessee/appellant submitted that the assessee company came into existence consequent to demerger of insurance products and service business by Mastek Ltd. to Majesco Ltd. vide order dated 30-4-2015.Further, Majesco Ltd. by way of slump sale transferred its offshore insurance operations to the assessee.

3. The assessee is carrying on business of development of software/solution for insurance sector in overseas market. The software/solution in the overseas market is distributed by the assessee through its Associated Enterprises (AEs) in each of the following countries:—

(1) United Kingdom;

(2) Canada;

(3) United States of America; and

(4) Malaysia

Separate distribution and master agreements were executed with each of the AEs. The same are available at pages 179 to 206 of the Paper Book. The ld. Authorized Representative of the assessee contended that a perusal of said agreements, would show that the AEs shall be responsible for distribution activities, appointing advertising agencies, negotiating contracts with overseas customers, etc. The service liability risk shall be borne by the assessee. As per the terms of agreement, the AEs for their services (distribution activities) are compensated for operating expenses (*i.e.* front office cost) incurred for undertaking distribution activities. The revenue earned from the customers after deducting such expenditure (at arm's length) is transferred to the assessee. The ld. Authorized Representative of the assessee further pointed that a close examination of the agreement would clearly show that the risk of the AEs as distributors is minimal as compared to that of the assessee being entrepreneur. To determine the arm's length price of the transaction between the assessee and its AEs, the assessee selected AEs as tested party. It would be relevant to note here that margins of comparable companies are higher than the margins of AEs and this fact has never been disputed by the lower authorities. Considering overseas AEs as tested party, the international transaction entered into by the assessee are at arm's length.

4. The ld. Authorized Representative of the assessee submitted that the Transfer Pricing Officer (TPO) questioned the status of AEs as distributors and held that the AEs are entrepreneurs. The TPO took the assessee as tested party and made Transfer Pricing adjustment (TP adjustment) of Rs. 11,80,11,000/-. Consequent to the order of the TPO dated 30-10-2018 passed under section 92CA(3) of the Act, the Assessing Officer passed draft assessment order dated 24-12-2018. Aggrieved by the order of TPO the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP *vide* directions dated 23-9-2019 dismissed the objections of assessee in toto. In line with the directions of the DRP, the Assessing Officer passed the impugned assessment order. Hence, the present appeal by the assessee.

5. The ld. Authorized Representative of the assessee submitted that the scheme of arrangement of demerger of insurance product and service business and transfer of off-shore insurance business by way of slump sale was approved by the Hon'ble Bombay High Court on 30-4-2015 and the Hon'ble Gujarat High Court on 15-5-2015. The appointed date for demerger of insurance product and service business from Mastak Ltd to Majesco Ltd. was fixed as 1-4-2014. Consequent to the scheme of arrangement insurance product and service business of Mastek Ltd was demerged to Majesco Ltd. Thereafter, Majesco Ltd. sold offshore insurance business in slump sale to the assessee w.e.f. 1-11-2014. The ld. Authorized Representative of the assessee submitted that assessee had acquired the business of insurances from its parent company *i.e.* Mastek Ltd. through Majesco Ltd. during the F.Y. 2014-15 relevant to assessment year 2015-16. The foreign AEs who were carrying on the activity of distribution for Mastek Ltd. under the agreement continued to perform same activities for the assessee. The ld. Authorized Representative of the assessee referred to transfer pricing order in the case of Mastek Ltd. for assessment year 2014-15 at page 766 of the paper book. The ld. Authorized Representative of the assessee submitted that Mastek Ltd. carried offshore insurance business since assessment year 2006-07 upto assessment year 2014-15. Throughout this period Mastek Ltd. selected foreign AEs as tested party and the same was never questioned by the Revenue. It is only when

offshore insurance business was carried by the assessee, the Revenue raised objection in treating foreign AEs as tested party.

The ld. Authorized Representative for the assessee asserted that even during the intervening period when offshore insurance business was conducted by Majesco Ltd. for short period after demerger, the Revenue raised no objection on foreign AEs being selected as tested party. The ld. Authorized Representative of the assessee pointed that for the period starting from 1-4-2014 to 31-10-2014 in the financial year 2014-15, offshore insurance business was carried by Majesco Ltd. for the benefit and in trust for the assessee. The income earned from offshore insurance business during the said period was offered by Majesco Ltd. in its return. To benchmark international transactions, Majesco Ltd. adopted AEs as tested party and the same was accepted by the Department. The ld. Authorized Representative of assessee referred to the transfer pricing order in the case of Majesco Ltd. for assessment year 2015-16, at page 915 of the Paper Book.

The ld. Authorized Representative of the assessee submitted considering the fact that agreements between the assessee and the AEs are identical to the agreements executed by the parent company with AEs, the principle of consistency demands that foreign AEs should be accepted as tested party by the Revenue. The ld. Authorized Representative for the assessee submitted that the role assigned to AEs is only that of a distributor with minimal risk. The ld. Authorized Representative of the assessee submitted that if overseas AEs are accepted as tested party, the international transactions between the assessee and its AE would be at arm's length and the entire adjustment made by TPO would fall.

6. To support its contention that foreign AEs can be selected as tested party, the ld.Authorized Representative of the assessee placed reliance on the following decisions:-

- *Landis Gyr Ltd.* v. *Dy. CIT* [IT Appeal No. 37 (Kol.) of 2012, dated 3-8-2016];
- *IDS Infotech Ltd.* v. *Dy. CIT* [2017] 80 taxmann.com 88/[2017] 189 TTJ 606 (Chandigarh - Trib.);
- *Asstt. CIT* v. *IDS Infotech Ltd.* [IT Appeal No. 442 (Chd.) of 2018, dated 4-2-2019];
- *TNT India (P.) Ltd.* v. *Asstt. CIT* [IT Appeal Nos. 1443 & 1444 (Bang.) of 2008, dated 3-11-2016];
- *CWT India (P.) Ltd.* v. *Asstt. CIT* [2019] 109 taxmann.com 182 (Mum. - Trib.);
- *Sutherland Healthcare Solutions Ltd.* v. *ITO* [2017] 77 taxmann.com 352 (Hyd. – Trib.);
- *Almatis Alumina (P.) Ltd.* v. *Dy. CIT* [2019] 107 taxmann.com 305 (Kol. – Trib.); &
- *Ranbaxy Laboratories Ltd.* v. *Dy. CIT* [IT (TP) Appeal No. 1782 (Delhi) of 2014, dated 5-9-2019].

7. In respect of ground No. 5 of the appeal, the ld. Authorized Representative of the assessee submitted that TPO has made adjustment of Rs. 2,71,00,000/- in respect of provision of performance guarantee given by the assessee/appellant to its AEs. The ld. Authorized Representative of the assessee submitted that the assessee is carrying on business of development of software/solution for insurance sector in overseas market. The major risk and rewards for the said services are of the assessee. A perusal of para 2.3 of distributor/master agreement with AEs would make it evident that

the service liability risk is borne by the assessee. In furtherance to the service liability, the assessee may issue performance guarantee to the customers. The ld. Authorized Representative of the assessee referred to the performance guarantee agreements at page 179 to 206 of the Paper Book executed by Mastek Ltd. (demerged entity) with its AEs. The ld. Authorized Representative of the assessee pointed that a perusal of the sample agreement would show that the guarantor *i.e.* Mastek Ltd. shall be liable as a primary obligor. The customer shall not be bound to seek or exhaust recourse against the AEs. The guarantee shall continue to be in effect notwithstanding termination or expiry of the Master Agreement with the AEs. Thus, from perusal of the guarantee agreement it can be deduced that performance guarantee is for the services provided by the Mastek Ltd. itself to the customer and there is no benefit received by the AEs. The ld. Authorized Representative of the assessee further referred to communication dated 16-4-2010 at page 1048 of the Paper Book to show that Mastek Ltd. has guaranteed irrevocably and unconditionally for due performance of the agreement entered into with the customers. The ld. Authorized Representative of the assessee asserted that performance guarantee given by the assessee is for its own business purpose and the same is not a service provided by the assessee to its AEs or on behalf of the AEs. Hence, the performance guarantee is not an international transaction. The TPO has erred in coming to the conclusion that performance guarantee is an international transaction and is a facility provided by the assessee to its AEs. The ld. Authorized Representative of the assessee submitted that similar adjustment was made in respect of performance guarantee in assessment year 2008-09 when the offshore insurance business was carried on by the Mastek Ltd. (the demerged company). The issue travelled to the Tribunal in *Dy. CIT* v. *Mastek Ltd.* [IT Appeal No. 2879 (Ahd.) of 2014, dated 19-3-2018]. The Tribunal *vide* order dated 19-3-2018 held that performance guarantee is not an international transaction. Similar view was taken by the Tribunal in assessment year 2009-10 and 2010-11 in the case of Mastek Ltd.

8. Shri A. Mohan, representing the Department vehemently defended the findings of TPO/DRP/AO in making/confirming TP adjustment on account of international transactions on provision/distribution of software services and provision of performance guarantee. The ld. Departmental Representative submitted that the TPO and the DRP has rightly rejected foreign AEs as tested party. To support his contentions ld. Departmental Representative placed reliance on following decisions:

(*i*) *Carraro India (P.) Ltd.* v. *Dy. CIT* [2019] 104 taxmann.com 166 (Pune – Trib.).

(*ii*) *Nivea India (P.) Ltd.* v. *Asstt. CIT* [2018] 92 taxmann.com 165 (Mum. – Trib.).

9. In respect of ground No. 5, the ld. Departmental Representative vehemently relied on the order of TPO and the direction of DRP.

10. Conroverting the submissions of ld. Departmental Representative, the ld. Authorized Representative of the assessee submitted that in the case of *Carraro India (P.) Ltd.* (*supra*) it was not brought before the Tribunal that the concept of overseas tested party and foreign comparable companies is well recognized and acknowledged by Indian Revenue Department. As could be seen from Indian Commentary in UN Practice Manual on Transfer Pricing in developed countries, in para 10.4.1.3 it has been categorically mentioned that in Transfer Pricing Administration preference is given to Indian comparables, however, foreign comparables are also considered as tested party, where foreign AE is least complex entity. The ld. Authorized Representative of the assessee further referred to OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration 2017 with respect to choice of tested party which states that least complex party should be selected as tested

party. The ld. Authorized Representative of the assessee further referred to the following decisions, where foreign AE was accepted as tested party.

- *General Motors India (P.) Ltd.* v. *Dy. CIT* [2013] 37 taxmann.com 403/[2014] 146 ITD 559 (Ahd. – Trib.)
- *ITO* v. *WNS Global Services (P.) Ltd.* [IT Appeal No. 2318 (Mum.) of 2009, dated 4-5-2018]
- *Yamaha Motors India (P.) Ltd.* v. *Asstt. CIT* [2014] 50 taxmann.com 444/151 ITD 731 (Delhi – Trib.)
- *Development Consultants (P.) Ltd.* v. *Dy. CIT* [2008] 23 SOT 455 (Kol.).

11. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We have also examined the material and case laws referred by both the sides during the course of their submissions. The assessee in appeal has raised five grounds. The ground No. 1to 3 are general in nature and hence, required no adjudication.

12. In ground No. 4 the assessee has assailed transfer pricing adjustment in respect of provisions of software services and in ground No. 5 of the appeal, the assessee has assailed transfer pricing adjustment in respect of international transactions of provision of performance guarantee given by the assessee appellant to its AEs.

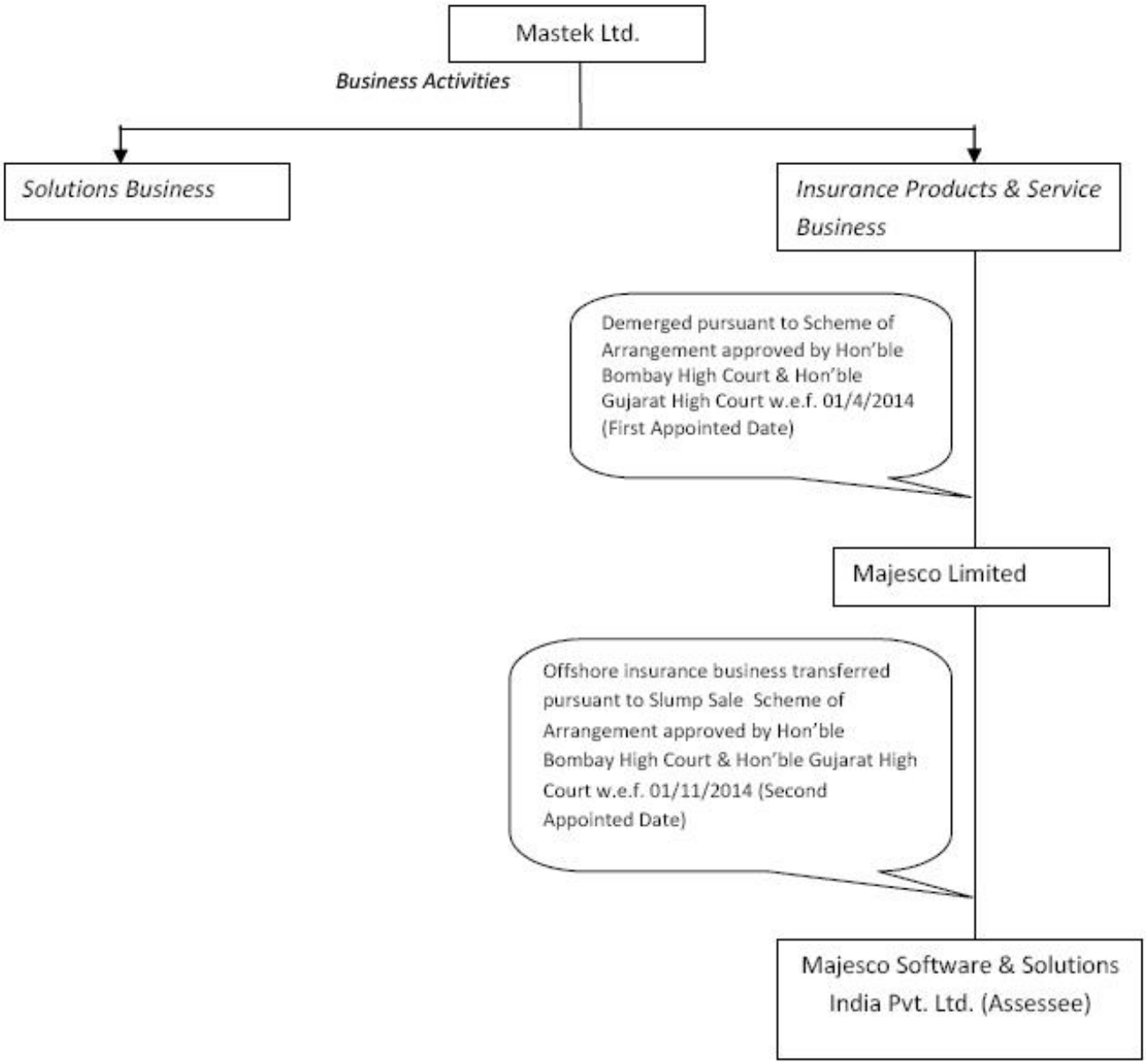
International Transaction- Provision of Software Services:

13. The assessee is engaged in provision of I.T. software services. During the period relevant to the assessment year under appeal, the assessee entered into following international transaction with its foreign AEs:

Nature of services	*Associated Enterprise (AE)*	*Amount (Rs.)*
Software Services	Majesco Sdn. Bhd(MSC)	7,87,57,476
Software Services	Majesco Canada Limited (MCAN)	26,31,973
Software Services	Majesco UK Limited (MUK)	6,38,73,953
Software Services	Majesco USA (MUS)	25,69,313

To benchmark its international transaction the assessee applied Transactional Net Margin Method (in short 'TNMM') as a most appropriate method and selected foreign AEs as Tested Party. The TPO rejected Transfer Pricing study conducted by the assessee primarily for selecting foreign AEs as Tested Party. The TPO observed that the foreign AEs of the assessee carry wide range of functions *viz.* marketing customer relationship as well as entrepreneurial skills, etc. Therefore, they are not mere distributors but are engaged in provision of software services as an entrepreneur. Per contra, the contentions of the assessee is that substantial risks is undertaken by the assessee. The foreign AEs are merely acting as distributors of the products of the assessee. As regards adoption of foreign AEs as Tested Party the contention of the assessee is that since business of foreign AEs is less complex, therefore, the foreign AEs were selected as Tested Party. It has been further contended that prior to demerger, when offshore insurance business was conducted by parent company of the assessee *i.e.* Mastek Ltd., the Revenue had accepted foreign AEs as Tested Party.

14. The assessee company started offshore insurance business during financial year 2014-15 and the assessment year under appeal is first year of assessee's business operations. Initially Mastek Ltd. was engaged in Solutions business and Insurance products and service business. The Hon'ble Bombay High Court *vide* order dated 30-4-2015 (at page 305 of Paper Book) and Hon'ble Gujarat High Court *vide* order dated 15-5-2015 (at page 423 of the Paper Book), respectively approved the scheme of arrangement w.e.f. 1-6-2015. Consequent to demerger, insurance products and services business was transferred from Mastek Ltd. to Majesco Ltd. w.e.f. 1-4-2014. The offshore insurance business was conducted by demerged company *i.e.* Majesco Ltd. Thereafter, ensuing slump sale of offshore insurance operations by Majesco Ltd. to the assessee, w.e.f. 1-11-2014 the said business was conducted by the assessee. Thus, during the period relevant to the assessment year 2015-16, for the part of the financial year 2014-15 *i.e.* from 1-4-2014 to 31-10-2014 offshore insurance business was carried by Majesco Ltd. and for the later part of the financial year 2014-15 starting from 1-11-2014 the offshore insurance business was conducted by the assessee. The evolution of assessee company from Masktek Ltd. can be easily understood with the help of following chart:—



15. Insofar as the facts relating to the business of the assessee and germination of assessee from demerger of Mastek Ltd. and slump sale of overseas insurance business by Majesco Ltd., the same are not disputed by the Department. Prior to demerger of offshore insurance operations, in order to determine ALP of the international transaction with its AEs, Mastek Ltd. selected foreign AEs as Tested Party. The same was accepted by the Department. This fact is evident from to the order of TPO passed under section 92CA(3) of the Act for assessment year 2014-15 dated 25-10-2017. The same is at pages 755 to 779 of the Paper Book.

16. As a result of demerger offshore insurance business was conducted by Majesco Ltd. for an intervening period. The said company also selected foreign AEs as tested party for determining ALP of distribution of software activities. The Revenue accepted the same. This fact is evident from Transfer Pricing study and the order of TPO in the case of Majesco Ltd. for assessment year 2015-16 dated 16-10-2018 at page 915 of the Paper Book. Majesco Ltd. conducted overseas insurance business for part of the financial year 2014-15 *i.e.* from 1-4-2014 to 31-10-2014, wherein the Revenue accepted the selection of foreign AEs as Tested Party. After 1st November, 2014 the offshore insurance business was transferred to the assessee consequent to slump sale. The assessee in its return of income for the impugned assessment year offered income from offshore insurance business during the period starting from 1-11-2014 to 31-3-2015. The assessee carry forward the business from where it took over from Majesco Ltd. with same set of foreign AEs and the same agreements. In other words there was no change in the nature of business of the assessee or in the terms and conditions of the activities to be performed by foreign AEs after transfer of offshore insurance business from Majesco Ltd. to the assessee. It is interesting to note that the TPO accepted foreign AEs as Tested Party in the case of Majesco Ltd. during the assessment year 2015-16. However, in the case of assessee for the remaining period of assessment year 2015-16 the Assessing Officer declined to accept foreign AEs as Tested Party. The Revenue has not disputed the nature of business and the terms and conditions of the business carried by the assessee and its parent company.

17. The issue that has emerged for adjudication before us is; whether foreign AE can be selected as 'Tested Party'. Before proceeding further, it would be relevant to refer to the meaning of 'Tested Party' and manner of selecting 'Tested Party'. The term Tested Party has not been defined under the provisions of Income-tax Act or the Rules framed thereafter. The Tested Party has been defined in the OECD guidelines as:

> "The OECD Guidelines defines 'tested party' as "the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparable can be found, *i.e.* it will most often be the one that has the less complex functional analysis."

UN Manual defines tested party in the similar manner. A Tested party should have the following attributes on bases of these definitions:

1. Available of reliable and accurate data for comparison

2. Least Complex (amongst the parties to the transaction)

3. Data available can be used with minimal adjustments."

18. The selection of 'Tested Party' is an important step in determination of Arm's Length Price. Therefore, selection of 'Tested Party' become significant in Transfer Pricing study. The basic requirement for selecting a 'Tested Party' is that the party should have least complex functional

analysis. The provisions of section 92C r.w rule 10B and 10C deal with computation of Arm's Length Price by applying one of the most appropriate method specified under the provisions of the Act. The 'Tested Party' for determining Arm's Length Price whether should be an Indian entity or can be a foreign AE has not been specified either under the Act or the Rules framed there under. In United Nations Practical Manual on Transfer Pricing for Developing Countries (2013), guidelines have been set out for selecting 'Tested Party'. The same read as under:

> "B.2.3.3.1 When applying the Cost Plus Method, Resale Price Method or Transactional Net Margin Method (see further Chapter B.3.) it is necessary to choose the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested. The choice of the tested party should be consistent with the functional analysis of the controlled transaction. Attributes of controlled transaction(*s*) will influence the selection of the tested party (where needed). The tested party normally should be the less complex party to the controlled transaction and should be the party in respect of which the most reliable data for comparability is available. It may be the local or the foreign party. If a taxpayer wishes to select the foreign associated enterprise as the tested party, it must ensure that the necessary relevant information about it and sufficient data on comparables is furnished to the tax administration and vice versa in order for the latter to be able to verify the selection and application of the transfer pricing method."

19. In United Nations Manual 2013 while listing the emerging Transfer Pricing challenges in India, it has been mentioned that India Transfer Pricing Administration is not averse to selection of foreign AE as a 'Tested Party' if foreign AE is a less complex entity. The relevant extract of the Transfer Pricing Practices and Challenges in India as stated in United Nations Practice Manual of Transfer Pricing 2013 reads as under:—

> "10.4.1.3 The regulations prescribe mandatory annual filing requirements as well as maintenance of contemporaneous documentation by the taxpayer in case international transactions between associated enterprises cross a threshold and contain stringent penalty implications in case of non-compliance. The primary onus of proving the arm's length price of the transaction lies with the taxpayer. The Indian transfer pricing administration prefers Indian comparables in most cases and also accepts foreign comparables in cases where the foreign associated enterprise is the less or least complex entity and requisite information is available about the tested party and comparables."

20. The Tribunal in one of the early decisions on the issue of foreign entity being selected as 'tested party' rendered in the case of *Ranbaxy Laboratories Ltd.* v. *Addl. CIT* [2008] 110 ITD 428 (Delhi)/167 Taxman 30, recognised that foreign AE can be taken as tested party to determine ALP of the transaction subject to certain conditions. The relevant extract of the Tribunal order reads as under:

> "58. We have also given careful thought to the other submissions of Shri Vohra. The tested party normally should be the party in respect of which reliable data for comparison is easily and readily available and fewest adjustments in computations are needed. It may be local or foreign entity, *i.e.,* one party to the transaction. The object of transfer pricing exercise is to gather reliable data, which can be considered without difficulty by both the parties, *i.e.,* taxpayer and the revenue. It is also true that generally least of the complex controlled taxpayer should be taken as a tested party. But where comparable or almost comparable, controlled and uncontrolled transactions or entities are available, it may not be right to eliminate them from consideration because they look to be

complex. *If the taxpayer wishes to take foreign AE as a tested party, then it must ensure that it is such an entity for which the relevant data for comparison is available in public domain or is furnished to the tax administration.* The taxpayer is not then entitled to take a stand that such data cannot be called for or insisted upon from the taxpayer."

[*Emphasised by us*]

21. In the case of *General Motors India (P.) Ltd.* (*supra*) the Ahmedabad Bench of the Tribunal after considering UN Transfer Pricing Manual and various decisions of the issue concluded that for analysing international transactions, less complex party to controlled transactions should be tested party, in respect of which more reliable data is available, it can even be foreign party. The relevant extract of the Tribunal order reads as under:

"11.3 …….. Thirdly, the Hon'ble Delhi Tribunal in the case of *Ranbaxy Laboratories(P.) Ltd.* (*supra*) took a stand that 'If the taxpayer wishes to take foreign AE as a tested party, then it must ensure that it is such an entity for which the relevant data for comparison is available in public domain or is furnished to the tax administration.'

Then, the United Nation's Practical Manual on Transfer Pricing for Developing Countries had observed that "5.3.3.1…… The tested party normally should be the less complex party to the controlled transaction and should be the party in respect of which the most reliable data for comparability is available. It may be the local or the foreign party. If a taxpayer wishes to select the foreign associated enterprise as the tested party, it must ensure that the necessary relevant information about it and sufficient data on comparables is furnished to the tax administration…."

11.4 Considering the divergent views expressed by various Tribunals (*supra*) and majority of them were in favour of selecting the 'tested party' either from local or foreign party and the United Nation's Practical Manual on transfer pricing for developing countries had observed that 'It may be the local or the foreign party', we tend to agree with the same."

22. In the case of *GKN Driveline (India) Ltd.* v. *Dy. CIT* [IT Appeal No. 278 (Delhi) of 2017, dated 28-3-2018], the Coordinate Bench after considering various decisions of the Tribunal and OECD Guidelines reiterated that foreign entity can be selected as 'tested party'. The relevant extract of the order is reproduced herein below for ready reference:

"10.5 We have perused the submissions advanced by both the sides in the light of the records placed before us. There is no dispute regarding the possibility of foreign AE to be tested party for the purposes of determining ALP of international transaction. However this can be allowed subject to fulfilment of certain conditions being:

- the tested party should be the one on which the transfer pricing can be applied in the most reliable manner;

- the tested party should be the one for which reliable comparables are easily found and available on the public domain;

10.6 As per OECD guidelines, by applying the most appropriate method, it is necessary to choose the party to the transaction for which a financial indicator is tested. The choice of tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner for

which the most reliable comparables can be found, that this will most often be the one that has the least complex functional analysis.

10.7 From the OECD guidelines at paragraph 3.18, certain relevant principles emerge for the purposes of selecting tested party:

(*a*) the choice of selecting tested party for compatibility is only available in CUP, TNMM.

(*b*) The tested party should be the least complex party to the controlled transactions.

(*c*) Availability of most reliable data of the tested party on the public domain and requirement of minimum adjustments is also one of the most important aspect while selecting the tested party.

(*d*) FAR study of the tested party should be detailed being less complex *vis-a-vis* the other entity."

23. Apart from the decisions of the Tribunal deliberated above and referred by ld. AR of the assessee during the course of making submissions, there are several other decisions rendered by various Benches of the Tribunal upholding selection of foreign AE as tested party provided its business is least complex, require minimum adjustments and for which reliable comparable data is available in public domain.

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 (P.) Ltd.* (*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.

The other decision on which ld. DR has placed reliance is in the case of *Nivea India (P.) 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.

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 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.

International Transaction/Provision of Performance Guarantee:

27. The ld. Authorized Representative of the assessee has pointed that identical issue had come up before the Tribunal in the case of assessee's parent company *Mastek Ltd.* (*supra*). It has been further contended that the terms and conditions of performance guarantee agreement are identical in the case of assessee and Mastek Ltd. In fact the assessee carried forward insurance product and service business of the parent company without any change in terms and conditions with AEs or its customers. This fact has not been disputed by the Revenue. We find that the Tribunal placed reliance on the decision in the case of *Suzlon Energy Ltd.* v. *Asstt. CIT* [2017] 81 taxmann.com 190/188 TTJ 278 (Ahd. – Trib.) and held that such guarantee agreement does not fall within the ambit of international transaction. For the sake of brevity the relevant extract of the said order being longish, is not reproduced. The ld. Departmental Representative has failed to controvert the finding of Tribunal in the case of *Mastek Ltd.* (*supra*). Respectfully following the order of Tribunal, the ground No. 5 of the appeal is allowed.

28. In the result, appeal of the assessee is allowed in the aforesaid terms.

RITESH

*In favour of assessee.