

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'H': NEW DELHI**

**BEFORE SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER  
AND  
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER**

ITA No.3813/Del/2024  
(ASSESSMENT YEAR 2020-21)

Keysight Technologies International India Pvt. Ltd., Omaxe Square, Plot No.14, 2 <sup>nd</sup> Floor, Non-Hierarchical, Jasola District Centre, Jamia Nagar, New Delhi-110025. <b>PAN-AAFCK4575N</b>	Vs.	The Dy. CIT, Circle-13(1), New Delhi.
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Sh. Vishal Kalra, Adv. and Ms. Kashish Gupta, CA
Department by	Shri S.K. Jadhav, CIT-DR
Date of Hearing	07.01.2026
Date of Pronouncement	18.03.2026

**ORDER**

**PER MANISH AGARWAL, AM:**

This appeal is filed by the assessee against the final assessment order dated 23.11.2021 passed U/s 143(3) r.w.s.144C(13) read with section 144B of the Income Tax Act, 1961 (hereinafter called 'the Act') subsequent to the direction of the Ld. Dispute Resolution Panel (DRP) vide direction dated 21.05.2024 for Asst. Year 2020-21.

2. Brief facts of the case are that assessee is a wholly owned subsidiary of Keysight Technologies Inc. and is engaged in the business of provision of IT Enabled Service (ITeS) and Software Development Services (SDS) providing to its

Associate Enterprises (AEs). The return of income was filed on 11.12.2020 declaring total income of Rs. 35,83,73,670/-. The case of the assessee was selected for scrutiny and since the assessee was carried out international transactions with its AE, a reference was made to the Transfer Pricing Officer (TPO) u/s 92CA of the Act. The TPO made transfer price adjustments of Rs. 4,13,32,187/- towards software development services provided by the assessee to its AE. Thereafter, the AO passed draft assessment order dated 26.08.2023 u/s 144C(1) of the Act wherein he has proposed the additions on account of TP adjustment made by the TPO besides the other income offered in the modified return. Accordingly, total income of the assessee was proposed to be assessed at Rs. 52,42,24,672/-. Against the said order assessee filed objections before the Id. DRP who vide order dated 21.05.2024 disposed-off the objections by giving certain directions to AO/TPO. The TPO than pass the order giving effect and TP adjustment as made earlier was reduced to Rs. 2,67,19,413/-. Thereafter, the AO passed the final assessment order dated 28.06.2024 wherein total income was assessed at Rs. 49,75,05,259/- by making addition on account of TP adjustment to the income declared in the modified return of income filed by the assessee.

3. Aggrieved by the said order, assessee is in appeal before the tribunal by taking following grounds of appeal:

*“1. That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant at INR 49,75.05.259/. in pursuance to the directions issued by the DRP, as against the returned income of INR 35,83,73,670/- as per original tax return (returned income as per modified tax returned amounts to INR 48,28,92,480 filed under Section 92CD read with 139 of the Act pursuant to an Advance Pricing Agreement)*

*2. That on the facts and in the circumstances of the case and in law, the directions issued by the DRP are bad in law, void ab initio and liable to be quashed as the same have been passed in violation of the provisions of sub-section (8) to section 144C of the Act.*

***Transfer Pricing adjustment amounting to INR 2,67,19,413/- in respect of the international transactions pertaining to provision of software development services:***

3. *That on the facts and circumstances of the case and in law, the AO/TPO/ DRP have erred in making the transfer pricing adjustment amounting to INR 2,67,19,413 in respect of international transaction pertaining to provision of software development services (SDS)" by the Appellant to its Associated Enterprises ("AES"), alleging that the same is not at arm's length price ("ALP")*

4. *That on the facts and circumstances of the case and in law, the reference made by the AD suffers from jurisdictional error as the AQ has not recorded any reasons in the assessment order based on which he reached the conclusion that it was "expedient and necessary to refer the matter to the TPO for computation of the ALP, as is required under section 92CA(1) of the Act.*

5. *That on the facts and circumstances of the case and in law, the AO/TPO/DRP have erred in modifying the economic/ benchmarking analysis adopted by the Appellant in its transfer pricing documentation (TP Documentation") without any cogent and scientific basis.*

6. *That on the facts and circumstances of the case and in law, the AO/TPO/DRP have erred in not appreciating the filters applied by the Appellant for benchmarking the international transaction pertaining to provision of SDS and consequently, erred in modifying the filters and applying additional quantitative filters not applicable to the functional profile of the Appellant. The AO/DRP further erred in upholding the action of the TPO.*

7. *That on the facts and circumstances of the case and in law, the AO/TPO/DRP have erred by erroneous rejection of comparable companies selected by the Appellant in its TP documentation even though they are functionally comparable to the Appellant and clears all the filters acceptable to the Appellant and to the TPO on various erroneous grounds.*

7.1. *That on the facts and circumstances and in law, the AO/TPO/DRP have erred in arbitrarily rejecting DCIS Dot Com Solutions India Private Limited and Rheal Software Limited as comparable companies for benchmarking the international transaction pertaining to provision of SDS.*

8. *That on the facts and circumstances of the case and in law, the AO/TPO/DRP have erred by erroneous inclusion of comparable companies which are functionally dissimilar to the Appellant and fails certain quantitative filters applied by the Appellant. Further, the additional comparable companies have been cherry picked by the TPO without any benchmarking analysis and valid search criteria*

8.1. *That on the facts and circumstances and in law, the AO/TPO/DRP have erred in arbitrarily selecting Mindtree Limited, Great Software Laboratory Private Limited,*

*Daffodil Software Private Limited, Nihilent Limited, Ascendum Solutions India Private Limited, Ltmindtree Limited, and Cybage Software Private Limited as comparables for benchmarking the international transaction pertaining to provision of SDS.*

9. *That on the facts and circumstances of the case and in law, the AO/TPO/DRP have erred in considering foreign exchange fluctuations gain to be non-operating in nature while computing the profit level Indicator ("PLI"), thereby modifying the PLI of the Appellant as per the TP documentation.*

10. *That on the facts and circumstances of the case and in law, the AO/ TPO/ DRP have erred in denying the economic adjustments for differences in the risk position of the Appellant vis-à-vis comparable companies*

### **Corporate Tax Additions**

11. *That on the facts and circumstances of the case and in law, the AO has erred in computing assessed income by considering the returned income as per original tax return instead of the income reported as per the modified tax return filed under Section 92CD read with 139 of the Act pursuant to an Advance Pricing Agreement ("APA").*

12. *That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income by considering additions pertaining to depreciation on goodwill and other adjustments without appreciating that the Appellant has suo moto disallowed such expenses in the modified tax return filed pursuant to the APA.*

13. *That on the facts and circumstances of the case and in law, the AO has failed to grant credit of self-assessment tax amounting to INR 4,22.10,000 deposited under Section 140A of the Act and duly reflecting in the Form 26AS of the Appellant, resulting in impugned tax demand.*

14. *That on the facts and circumstances of the case and in law, the AO has failed to grant credit of tax-collected at source amounting to INR 14,994 in accordance with provisions of Section 206C(4) and duly reflecting in the Form 26AS of the Appellant.*

### **Levy of interest u/s 234A, 234B and 234C of the Act**

15. *That on the facts and circumstances of the case and in law, the AO has erred in facts and in law in charging and computing interest under relevant sections 234A, 234B and 234C of the Act.*

### **Incorrect levy of penalty u/s 270A of the Act**

16. *That on the facts and circumstances of the case and in law, the AO has erred both in facts and in law in initiating penalty proceedings under section 270A of the Act.*

*Each of the above grounds are independent and without prejudice to the other grounds of appeal preferred by the Appellant.*

*The Appellant prays for leave to add, alter, vary, omit, substitute, or amend the above grounds of appeal, at any time before, or at, the time of hearing of the appeal.”*

4. Grounds of appeal No. 1 & 2 are general in nature thus not adjudicated.
5. Grounds of Appeal No. 4, 5, 11 and 12 are not pressed thus are dismissed.
6. In Grounds of Appeal No. 3 & 6 to 10, the assessee has challenged the transfer pricing adjustments of Rs. 2,67,19,413/- made under Software Development Services by including certain comparables and excluding certain comparables from the final set of comparables. The assessee further challenged the action of AO/TPO of treating the foreign exchange fluctuation gains as non-operating item and further not allowing the risk adjustment as claimed by the assessee. Thus, all these grounds of appeal are taken together for consideration.
7. Before us, Id. AR submits that Assessee is engaged in development of modules as well as part of modules for software being used by its overseas group entities in their products. Apart from this assessee performs testing and maintenance support services which includes bug fixing, carrying on maintenance and support services on software used on products developed by the group entities etc. Id. AR Submits that assessee has apply method as most appropriate method (MAM) which has been accepted by the TPO. The Id. AR further submits that assessee company has arrived at PLI at 13.43% on cost however, the AO/TPO by treating the foreign exchange gain / loss as non-operative in nature, has reworked the segmental operating profit margin at 11.92% for ITeS segment and 12.01% for software development services segment. Further, out of total 13 comparable selected by the assessee, the TPO has rejected few comparables and further included few new comparables and worked the OP / OC at 19.42% and accordingly, made the adjustment of Rs. 4,13,32,187/- to the international transactions carried out under

the segment of provision of software development services. After following the directions given by the Id. DRP of providing working capital adjustment etc., the AO/ TPO has finally worked out the adjustment at Rs. 2,67,19,413/- by taking OP/OC at 16.80%.

8. On the issue of exclusion of the comparables selected by the assessee in its TPSR, the Id. AR submits that one of the comparable namely M/s DCIS Dot Com Solutions India Pvt. Ltd. has been excluded by TPO by observing that this company has fails persistent loss filter as the company has made losses in two out of three financial years. The Id. AR contended that persistence loss filter is applicable where losses are shown in Current year as well as in preceding two assessment years. However, the company has shown profits in financial year 2017-18 whereas there were losses in Financial years 2018-19 and 2019-20 thus, it is not the case of continuous / persistent losses in all the three assessment years. Similarly, in the case of Rheal Software Pvt. Ltd. same argument is made by the Id. AR and submitted that both these companies have not passed the persistent loss filter and therefore the same should not be excluded from the final set of comparables. For this reliance is placed on the various judgments of the Coordinate Benches of Tribunal which are tabulated as under:

- *Genesys Telecom Labs India Pvt. Ltd. v. DCIT: /IT(TP)A No.: 38/CHNY/2024 (AY 2020-21)*
- *Daido India (P.) Ltd. vs. DCIT [2025] 176 taxmann.com 716 (Delhi - Trib.)*
- *Nokia Solutions and Networks India (P.) Ltd. vs. ACIT [2024] 160 taxmann.com 729 (Delhi - Trib.)*
- *DCIT v. Marubeni India (P.) Ltd.: [2023] 146 taxmann.com 98 (Delhi - Trib.)*
- *Imsofer Manufacturing India (P.) Ltd. v. DCIT: [2020] 121 taxmann.com 209 (Delhi - Trib.)*
- *Escorts Ltd. v. DCIT: [2022] 138 taxmann.com 138 (Delhi - Trib.)*
- *DCIT vs. Nomura Structured Finance Services (P.) 138 Ltd. [2022] taxmann.com 169 (Mumbai - Trib.)*
- *KBACE Technologies Pvt. Ltd. v. DCIT: ITA No.3189/Bang/2018*
- *Mindteck India Ltd. v. DCIT: IT(TP)A No.252/Bang/2021*

- *ISG Novasoft Technologies Ltd. v. DCIT: IT(TP)A No. 804/Bang/2022*
- *Swiss Re Global Business Solutions India (P.) Ltd. v. Addl. ITO: [2022] 137 taxmann.com 417 (Bangalore).*
- *Affinity Express India Pvt. Ltd. v. DCIT: ITA No. 106/PN/2012.*

9. On the other hand, ld. CIT DR vehemently supported the orders of lower authorities and submits that if there are losses in two years out of the three years, same should be excluded from the final set of comparables, and therefore, the AO/TPO has rightly excluded these two companies which order deserves to be sustained. He prayed accordingly.

10. Heard the parties and perused the material available on record. From the facts as submitted before us and the financial statements placed in the paper book for both the companies, it is observed that these two companies have not incurred continuous/persistent losses in three successive assessment years and out of the three years selected i.e. the year under appeal and of immediately two preceding assessment years, in one of the year, these companies declared profits and therefore, failed to pass the persistent loss filter. As has been held by the coordinate benches of Tribunal in the aforesaid judgements relied upon by the assessee, persistent loss filter can be applied only if there is loss in three successive assessment years and if there is profit in anyone of the three successive financial years selected, then the company cannot be excluded on the basis of persistent loss making filter as applied by the AO / TPO in the instant case.

11. In the light of above discussion, we direct the AO / TPO to include these two companies in the final set of Comparable. We order accordingly.

12. Now coming to the issue of exclusion from the final set of comparables of companies which are selected by the DRP, the ld. AR for the assessee submits that

the TPO has included Mind Tree Limited as a valid comparable by observing that this company is functionally not comparable since it is engaged in diversified activities such as IT Consulting, Information Management, Business Process Management, Business Technology Consulting, Cloud Digital etc. For this Id. AR drew our attention to the Annual Report of the company available at pages 281, 282 and 466 of the Paper book. Ld. AR submits that assessee is engaged in providing software development services and IT enabled services which are not at all comparable with the activities/ functions performed by Mind Tree. Besides this Id. AR submits that company Mind Tree has no segmental information based on clients industry classes or non-business function wise where the segmental breakup information for software development services are not applicable. Another reason stated for the exclusion of this company is that the turnover of Mind Tree was Rs. 77643 million which is almost 37 times of the turnover of the assessee company. One more aspect which is contended by Id. AR for the exclusion of Mind Tree is that it owned goodwill of Rs. 1180 millions which is much higher as compared to the assessee. Ld. AR therefore prayed for the exclusion of this company from the final set of comparable and also placed reliance on the various judgments wherein the company Mind Tree was excluded in the final set of comparables.

13. Another company which the Ld. AR requested for exclusion is M/s Nihilent Limited which is included in the final set of Comparable by the AO / TPO on the ground that it is functionally not comparable since it is engaged in the diversified activities such as consulting, enterprise and digital transformation services which are at all a comparable with the assessee. Nihilent is engaged in wide range of activity which includes business consulting in the area of enterprise transformation etc. Another reason for exclusion is that in the case of Nihilent, segmental data is not available for the software development services besides this the company has

extraordinary events such as acquisition of 10% equity stake during the year and also making investments in the R & D facilities therefore it is not a valid inclusion. Ld. AR thus prayed for the exclusion of both the comparables.

14. On the other hand, ld. CIT DR vehemently supported the orders of lower authorities and submits that AP/TPO has rightly included these two companies which are engaged in the same line of business and thus are valid comparables. Therefore, he requested for the confirmation of the action of AO/TPO.

15. Heard the parties and perused the material available on record. It is observed that both the companies included by the TPO are not comparable as they are functionally dissimilar with the business of the assessee. Moreover, either they are having very high turnover or having extraordinary event during the year. Besides in the case of both the companies segmental data for software development services are not available therefore, they cannot be taken as valid comparables. Further in the case of *PCIT vs. Global Logic India Limited* reported in [2023] 155 Taxman.com 483 (Delhi), the Hon'ble high court has confirmed the order of tribunal where the tribunal excluded the company for the reason that the segmental date for software development services was not available. The relevant observations of the hon'ble court are as under:

7. As regards exclusion of Wipro Technologies Services Ltd. as comparable is concerned, the Tribunal has relied upon its decision in *Microsoft India (R&D) (P.) Ltd. v. Dy. CIT* [2018] 97 taxmann.com 360 (Delhi - Trib.).

7.1 This decision of the Tribunal was carried in appeal to this court. Via decision dated 4-1-2021 passed in a bunch of appeals, which includes *Microsoft India (R & D) (P.) Ltd. v. Dy. CIT* [2023] 153 taxmann.com 199/[2021] 431 ITR 483 (Delhi) ITA 247/2019, this court, while rejecting the same has made the following observations:

"7. We notice that insofar as Infosys Technology Limited and Persistent Systems Limited are concerned, the learned ITAT observed that while the profit of the aforesaid three comparables is derived from both software development services as well as software products, however there is no

*precise information about the contribution made from the income derived from the sale of software to the total income of the companies. Thus, in the absence of segmental information provided by the companies in respect of the software services, the aforesaid companies have been excluded from the list of the comparables. We do not find any perversity in the approach adopted by the learned ITAT which would call for our inference. The third comparable viz Wipro Technology Services Limited has been held to be disqualified under Rule 10B(1)(e)(ii), to become a comparable for uncontrolled transaction for the purposes of inclusion in the final list of comparables. The rationale for exclusion has been upheld by this court in Principal Commissioner of Income Tax-7 v. Open Solutions Software Services Pvt. Ltd."*

*7.2 Mr Bhatia does not dispute the fact that the respondent/assessee is in the business of providing software development services. The two comparables i.e., Wipro Technologies Services Ltd. and Infosys Ltd. are in the business of not only software development services but also in the sale of software products.*

*8. Clearly, since according to the Tribunal the segmental information was not available, the comparables were ordered to be excluded.*

*9. We are of the opinion that there is no error in the approach adopted by the Tribunal, which is otherwise in line with the view taken by the coordinate bench.*

*10. Before we conclude, we may note that the Tribunal has adverted to the notification dated 18-9-2013. This notification, on the face of it, can have no application in the instant case, as the period in issue is AY 2011-12.*

16. Thus, by respectfully following the aforesaid judgement of Hon'ble Delhi High court and various judgments of different benches of Tribunal as relied upon by the assessee, we direct the AO/TPO to exclude these two comparables from the final set of comparables. We order accordingly.

17. Now coming to the issue of considering the foreign exchange gain as non-operating in nature for computing the profit level indicator (PLI), it is observed that TPO has taken Foreign exchange gain as non-operating item whereas the assessee has taken it as operating item since the foreign exchange fluctuation pertained arises from the transactions which are directly related to the main business operation of the assessee company of export of services and thus the gain arising on account of realization should be considered as operating income. For this, ld. AR placed reliance on the judgment of Hon'ble Jurisdictional High Court in the case of **PCIT**

**Vs. Samsung India Electronics Pvt. Ltd.** reported in [2024] 166 Taxman.com 130 (Delhi), wherein the Hon'ble court has held as under:

*"3. That only leaves us to examine the issues which are sought to be canvassed and pertain to foreign exchange gain/loss. Those questions too stand answered against the appellant in light of the judgment rendered in ITA 206/2016 dated 23 March 2016. We take note of the following observations as they appear in that decision:*

*"3. The question sought to be urged by the Revenue is whether the ITAT was correct in directing the foreign exchange gain/loss to be considered as an item of operating revenue/cost ?*

*4. The ITAT has in the impugned order noted the fact that the foreign exchange gain earned by the Assessee is in relation to the trading items emanating from the international transactions. Since the foreign exchange loss directly resulted from trading items, it could not be considered as a non-operating loss. Further, it is noted by the Dispute Resolution Panel that the service agreement between the Associated Enterprise (AE) and the Assessee stated that for the specified products and services provided by the Assessee, it "shall raise invoices on Ameriprise USA on the basis of a cost plus pricing methodology." The ITAT was therefore right in holding that the AO was not justified in considering the foreign exchange loss as a non-operating cost."*

*4. Consequently, we find that the appeal fails to raise any substantial question of law. It shall, consequently, stand dismissed.*

18. On the other hand, ld. CIT DR supports the order of the TPO/AO and submits that foreign exchange fluctuation gain or loss is not is pertained to regular business activity and thus non-operating in nature. He therefore prayed that the AO /TPO has rightly treated the same non-operating item for working the PLI.

19. Heard the contention of both the parties. It is observed that the TPO has treated the foreign exchange fluctuation gain as non operating item but fact remained that foreign exchange fluctuations gains / losses are suffered at the time of realization from the debtors out of the sales / services made to them and therefore, they are having direct relation with the main business operation and cannot be treated as the non-operating item. The Hon'ble Jurisdictional High Court in the case of **PCIT vs.**

***Samsung India Electronics Private Limited*** (Supra) also held that foreign exchange fluctuations gain is operating in nature. Thus, by respectfully following the aforesaid judgment of hon'ble Delhi High Court, we are of the view that foreign exchange fluctuation is to be treated as operating in nature for working the PLI. We order accordingly

20. Another issue that before the TPO, assessee had sought risk adjustment on account of contractual arrangements where is the comparable companies are at full risk bearing entities. Assessee claimed that it is a routine service provider operating in a risk mitigating environment as it is compensated for all its costs by the assured returns.

21. After considering submissions of both the parties, we restore this issue to the file of the AO/TPO with the directions to consider the claim of the assessee and decide the same in accordance with law.

22. With these observations, grounds of appeal No. 3 & 6 to 10 are partly allowed.

23. Ground of Appeal No. 13 and 14 are with respect to allowing the credit of self assessment tax and TCS. After hearing both the parties, we direct the AO to allow the necessary credit of the tax paid during the year as well as TCS after due verification as per law.

24. The ground of appeal No. 15 is regarding charging of interest u/s 234B, which is consequential in nature.

25. Ground of appeal No. 16 is with respect to initiation of penalty proceedings which is premature thus dismissed

26. In the result appeal of the assessee is partly allowed.

Order is pronounced in the Open Court on 18. 03. 2026.

Sd/-  
**(YOGESH KUMAR U.S.)**  
**JUDICIAL MEMBER**

Sd/-  
**(MANISH AGARWAL)**  
**ACCOUNTANT MEMBER**

Dated: 18.03.2026

*\*PK, Sr. PS\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**  
**ITAT NEW DELHI**