IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA NO. 1060/MUM/2017 : **A.Y : 2009-10**

Diebold Systems Pvt. Ltd., (Successor to Diebold India Pvt. Ltd.) Rolta Tower-1, 5th floor, Plot no. 39, Central Road, MIDC, Marol, Andheri (E), Mumbai 400 093. **PAN : AAACD3206C** (Appellant)	Vs.	DCIT-12(2)(1), Mumbai (Respondent)

Appellant by : Shri Deepak Chopra
Respondent by : Mrs. Malathi Sridharan/
Shri V. Jenardhanan

Date of Hearing : 09/03/2018
Date of Pronouncement : 23/03/2018

O R D E R

PER G.S. PANNU, AM :

The captioned appeal by the assessee is directed against the order dated 31.01.2017 passed by the Assessing Officer u/s 143(3) r.w.s 92CA(4) r.w.s. 153 r.w.s. 144C(13) r.w.s. 245Q of the Income Tax Act, 1961 (in short 'the Act') giving effect to the directions of Dispute Resolution Panel-I, Mumbai (DRP) dated 26.12.2016.

2. In its appeal, assessee has raised the following Grounds of appeal :-

*"**A. General Grounds***

1. That on the facts and circumstance of the case and in law, the final assessment order passed by the Assessing Officer ("AO"), to the extent prejudicial to the Appellant, is bad in law and void ab-initio.

2. That on the facts and in the circumstances of the case and in law, the AO erred in assessing the total income of the Appellant at INR 11,53,45,380/- as against the loss declared of INR 6,38,42,150/-.

B. Grounds on Jurisdiction

3. That without prejudice to the foregoing grounds the Final Assessment Order dated 31.01.2017 passed under section 143(3)/144C(13) of the Income Tax Act, 1961 (Act) is bad in law and liable to be quashed as the assessment was framed on a non-existing entity (the said company having merged with Diebold Systems Pvt. Ltd. w.e.f. 1.10.2013).

4. That the Final assessment order dated is also bad in law since it has not been framed in compliance with the directions issued by the Dispute Resolution Panel (DRP).

5. That the passing of the Final Assessment Order on a company no longer in existence is an illegality, incapable of being cured, resulting in the impugned order amenable to quashing.

C. Corporate Tax Grounds

*C.1 Disallowance of payment for purchase of software being treated **as royalty under section** 40(a)(i) of the Act*

6. That the AO/DRP grossly erred in law in not appreciating that the provisions of section 40(a)(i) of the Act were not applicable on the facts of the present case, there being no application of section 195 of the Act, in the absence of any income of the non-resident recipient chargeable to tax in India.

7. That the AO/DRP erred in law in not appreciating that the provisions of the domestic law did not apply given that the recipient was a non-resident and hence liable to be governed by the provisions of the DTAA as per section 90(2) of the Act.

8. That the AO / DRP erred on facts and in law to hold that the payments of INR 13,87,46,021/- made by the Appellant to Diebold USA for purchase of software were in the nature of 'Royalty' within the meaning of Article 12(3) of the Double Taxation Avoidance Agreement between India and USA (DTAA) as well under section 9(1)(vi) of the Act and thereby erred in disallowing the same under section 40(a)(i) of the Act.

9. That the AO/DRP erred in law not appreciating the difference between the term 'right to use a copyright' and the term 'right to use a copyrighted article'.

10. That the AO/DRP erred in law in concluding that whether there is a transfer of any right in copyright or a transfer of only a copyrighted article is not relevant, once there is a transfer or grant of some right the payment for such transfer is in the nature of royalty as the two are not distinct and hence disallowed the payment for purchase of software amounting to INR 13,87,46,021/- under the Act as well the DTAA.

11. That the AO/DRP grossly erred in law and went against the settled principles regarding the taxability of payment for purchase of software by bringing in new concepts of 'doctrine of updating construction', 'lex specialise derogate le gigenerali' and 'lex posterior derogatlegi priori' to conclude that a special legislation overrides general legislation and later law repeals the earlier law, which is in complete disregard of the fact that an amendment in the domestic law cannot be read into the provisions of the DTAA.

12. That the AO/DRP erred in law while trying to incorporate/import the definition of royalty as contained in the explanation to section 9(1)(vi) of the Act [as a result of the retrospective amendment] into the DTAA to disallow the amount of INR 13,87,46,021/- being payments made for the purchase of software from Diebold USA.

13. That the AO/ DRP erred in law in concluding that 'copyright' is a bundle of rights and as per the amended definition of royalty under the Act the phrase

'transfer of all or any rights' would mean transfer of any right would partake the character of Royalty under the Act and any payment for such transfer shall be taxable under the Act.

14. That, without prejudice, the AO/DRP grossly erred in law in not appreciating that given the provisions of the non-discrimination clause being Article 26(3) of the DTAA, the payments made by the Appellant to Diebold Inc. for purchase of software could not be a subject matter of disallowance.

15. That further without prejudice, the AO patently erred in observing that Appellant is a Permanent Establishment (PE) of Diebold Inc., USA being the Parent company of the Appellant which contrary to the provisions of Article 5(6) of the DTAA.

16. That even otherwise the AO grossly erred in law in making baseless observation of existence of PE of Diebold Inc. in India without there being any material on record to support such conclusion.

D. Transfer Pricing Grounds

D.1 General

17. That on facts and in law, the TPO / DRP erred in determining/confirming the transfer pricing adjustment of INR 4,04,41,505/- to the value of international transactions pertaining to Purchase of Raw Material.

18. That the AO/DRP fundamentally erred on facts and in law in making the above adjustment to the value of the international transaction primarily on the grounds that the Appellant had related as well as non-related sales segment and the adjustment could not have been made on total cost base of the Appellant.

19. That the TPO/DRP completely failed to appreciate that the Appellant had determined its operating profitability by applying the Transactional Net margin Method (TNMM) and there being an internal TNMM available owing to non-related party sales segment, no question arose of application of external TNMM.

20. That on facts and in law, the TPO / DRP erred in rejecting the Transfer Pricing documentation maintained by the Appellant u/s 92D of the Act read with Rule 10D of the Income Tax Rules, 1962 ("the Rules") and in not making appropriate adjustment in accordance with Rule 10B(3) of the Rules.

D.2 Allowance of adjustments while determining operating profit margin

D.2.1 Depreciation/working capital adjustment/extra-ordinary costs

21. That on facts and in law, the TPO / DRP failed to make suitable adjustments while computing the profit margin owing to the difference in respect of depreciation claimed by the Appellant and the comparables.

22. On the facts and in law, the TPO / DRP erred in not allowing working capital adjustment to the Appellant thereby contravening the provisions of Rule 10B(1)(e)(iii) and Rule 10B(3) of the Rules.

23. That on facts and in law the TPO / DRP erred in not making suitable adjustment to the profit margin of the comparables under Rule 10B(1)(e)(iii) so as to eliminate the extraordinary costs affecting the profit margin of the Appellant, without prejudice that such adjustment had to be made on the operating margin of the comparables.

D.2.2. On selection of comparables

24. That on facts and in law, the TPO / DRP grossly erred in not appreciating that comparability of an international transaction with an uncontrolled transaction shall be judged in accordance with the mandate of section 92C of the Act read with Rule 10B(2) of the Rules thereby meeting the Functions, Asset and Risk ('FAR') test and further erred in not appreciating that there could be no estoppel against law in selection of comparables.

25. That the TPO / DRP erred in selecting comparables having significant related party transactions.

26. On facts and in law, the TPO / DRP erred in not granting benefit of the 5% variation as per the proviso to section 92C(2) of the Act to the Appellant, as the law stood at the time of preparation of the transfer pricing documentation.

E. <u>Consequential Grounds</u>

27. That the AO erred in levying interest under section 234A, 234B, and 234D of the Act.

28. That the AO erred in initiating penalty proceedings under section 271(1)(c) of the Act."

3. Though assessee has raised multiple Grounds of appeal, but the preliminary Ground relating to jurisdiction is contained in (B) above, which is being dealt with at the threshold itself. In terms of the said Ground, it is canvassed that the assessment order passed u/s 143(3) r.w.s 92CA(4) r.w.s. 153 r.w.s. 144C(13) r.w.s. 245Q dated 31.01.2017 is bad-in-law inasmuch as it has been passed in the name of a non-existent concern. The plea set-up by the assessee is that the entity, Diebold India Pvt. Ltd., in whose name assessment has been completed, did not exist on the date of assessment inasmuch as it stood merged with its successor company, Diebold Systems Pvt. Ltd. in terms of the scheme of amalgamation approved by the Hon'ble Bombay High Court vide its order dated 23.08.2013 w.e.f. 01.10.2013. Since the said issue goes to the root of the jurisdiction of the Assessing Officer to pass the assessment order, therefore, both the sides have been heard on this preliminary ground at the threshold itself.

4. In brief, the relevant facts are that the erstwhile M/s. Diebold India Pvt. Ltd. filed a return of income on 31.12.2009 for the Assessment Year 2009-10 declaring a loss of Rs.6,38,42,150/-. The assessment u/s 143(3)

r.w.s 92CA(4) r.w.s. 153 r.w.s. 144C(13) r.w.s. 245Q of the Act has been finalised on 31.01.2017 whereby the total income has been assessed at Rs.11,53,45,376/-. The difference between the returned and the assessed income is on account of two additions, namely, disallowance u/s 40(a)(ia) – Rs.13,87,46,021/- and transfer pricing adjustment – Rs.4,04,41,505/-. The aforesaid assessment has been finalised subsequent to an order passed by the Dispute Resolution Panel (DRP) dated 26.12.2016, on the basis of the objections raised by the assessee against the draft assessment order passed by the Assessing Officer u/s 144C(1) r.w.s. 143(3) r.w.s. 245Q of the Act dated 26.03.2016. Such additions have also been assailed on merit before us in the aforestated Grounds of appeal. Be that as it may, for the present, we confine ourselves to the facts relating to the preliminary Ground that has been heard at the threshold. At the time of hearing, the learned representative for the assessee pointed out that consequent to the order of the Hon'ble Bombay High Court dated 23.08.2013, the assessee-company and two other group concerns stood merged w.e.f. 01.10.2013 with the successor-company, Diebold Systems Pvt. Ltd.

5. It is sought to be pointed out that as a consequence, w.e.f. 01.10.2013, the erstwhile Diebold India Pvt. Ltd. became non-existent as it stood merged with Diebold Systems Pvt. Ltd. Thus, the final assessment order passed in the name of the erstwhile Diebold India Pvt. Ltd. was invalid in the eyes of law inasmuch as it was made against a non-existent entity. In support, reliance has been placed on the following decisions :-

i) Jitendra Chandralal Navlani & Anr. vs UOI & Ors., 386 ITR 288 (Bom.);

ii) M/s. Shell India Markets Pvt. Ltd. vs ACIT (LTU), ITA No.772/Mum/2013 dated 20.12.2017;
iii) M/s. Instant Holdings Ltd. vs ACIT, ITA No. 4593/Mum/2011 dated 09.03.2016;
iv) M/s. Siemens Technology Services Pvt. Ltd. vs ACIT, ITA No. 6313/Mum/2012 dated 16.11.2016;
v) Spice Infotainment Ltd. vs CIT, (2012) 247 CTR 500 (Del HC) confirmed by Hon'ble Supreme Court vide order dated 02.11.2017 in CA No. 285 of 2014;
vi) CIT vs Dimension Apparels P. Ltd., 370 ITR 288 (Delhi) confirmed by Hon'ble Supreme Court vide order dated 02.11.2017 in CA No. 285 of 2014;
vii) CIT vs Intel Technology India (P) Ltd., 380 ITR 272 (Karn); and,
viii) I.K. Agencies (P) Ltd. vs Commissioner of Wealth Tax, 347 ITR 664 (Cal)

6. At the time of hearing, the learned representative for the assessee has also referred to communications dated 02.03.2016, 04.07.2016 and 19.07.2016 made to the Assessing Officer wherein the factum of the merger of the erstwhile Diebold India Pvt. Ltd. with Diebold Systems Pvt. Ltd. has been brought out.

7. On the other hand, the ld. DR appearing for the Revenue has not disputed the fact-situation brought out by the assessee, but arguments were made in support of the assessment order passed by the Assessing Officer. Firstly, it has been pointed out that the final assessment order has been passed by the Assessing Officer in the name of "*M/S. DIEBOLD INDIA PVT. LTD. (Now merged with DIEBOLD SYSTEMS PVT. LTD.)*". It has been pointed out that the name of the new entity, Diebold Systems Pvt. Ltd. appears in the bracket and that it is merely a procedural error, if any. Secondly, it is pointed out that the order passed by the DRP in this case is in the name of

"*Diebold Systems Private Limited (Successor to Diebold India Private Limited)*". On this basis, it is sought to be pointed out that the DRP has passed the order in the name of the successor/new entity, i.e. Diebold Systems Pvt. Ltd. and the final assessment order passed by the Assessing Officer on 31.01.2017 in the name of Diebold India Pvt. Ltd. (now merged with Diebold Systems Pvt. Ltd.) is only a mistake or omission which is rectifiable in terms of Sec. 292B of the Act. Thirdly, it is pointed out that there is no dispute so far as the initiation of assessment proceedings by issuance of notice u/s 143(2) of the Act on 19.08.2010 is concerned, it has been correctly initiated in the name of the erstwhile entity and, therefore, the initiation of assessment proceedings is not bad-in-law. Lastly, it has also been sought to be canvassed that the erstwhile entity ceased to exist only from 01.10.2013 and the previous year relevant to the assessment year under consideration is financial year ending on 31.03.2009, which is prior to the date of amalgamation. Therefore, in terms of the provisions of Sec. 170(1)(a) of the Act, assessment can be made in the name of the amalgamated company because the said section provides that "*in the case of succession of business, predecessor shall be assessed in respect of income of the previous year in which succession took place, up to the date of succession*." Apart therefrom, the ld. DR also relied upon the following judgments:-

i) M/s. Balaji Industries Ltd. amalgamated with Balaji Hotels and Enterprises Ltd. vs DCWT, Tax Case Appeal Nos. 1061 to 1064 of 2007 dated 18.04.2017 (Madras High Court);

ii) CIT vs Shaw Wallace Distilleries Ltd., [2016] 70 taxmann.com 381 (Calcutta); and,

iii) GE Medical Systems (India) Pvt. Ltd. (since merged with Wipro GE Healthcare Pvt. Ltd.) vs ACIT, IT(TP)A No. 563/Bang/2016 dated 21.04.2017

to contend that the instant assessment order could not be construed as invalid merely because it has been passed in the name of an erstwhile non-existent entity.

8. We have carefully considered the rival arguments and also the written submissions filed by both sides. In the instant case, factually it emerges that the final assessment order passed by the Assessing Officer on 31.01.2017 (supra) is in the name of M/s. Diebold India Pvt. Ltd., a concern which was non-existent as on that date, having merged with Diebold Systems Pvt. Ltd. consequent to a scheme of merger approved by the Hon'ble Bombay High Court vide order dated 23.08.2013. Insofar as the fact of the merger being in the knowledge of the Assessing Officer is concerned, the same cannot be disputed inasmuch as while framing the assessment order in the name of Diebold India Pvt. Ltd., in the brackets it has been noted that the said concern has since merged with Diebold Systems Pvt. Ltd. The moot question is as to whether the assessment order so made in the name of Diebold India Pvt. Ltd., the erstwhile concern which is non-existent, is valid in the eyes of law or not?

9. The aforesaid issue is no longer *res integra* and is, in fact, supported by various decisions and one of them, i.e. the judgment of Hon'ble Delhi High Court in the case of *Spice Infotainment Ltd. (supra)* has also since been approved by the Hon'ble Supreme Court vide order dated 02.11.2017 in CA No. 285 of 2014. Notably, the Hon'ble Bombay High Court in the case of

Jitendra Chandralal Navlani & Anr. (supra) has also approved the proposition that the defect of framing an assessment in the name of a non-existing concern goes to the root of the jurisdiction of the Assessing Officer to make the assessment. The Hon'ble Delhi High Court in the case of *Dimension Apparels P. Ltd. (supra)* also held that framing of assessment on a non-existent entity is a jurisdictional defect and such an assessment is untenable in the eyes of law. On behalf of the assessee, reliance has been placed on the decision of the Mumbai Bench of the Tribunal in the case of *M/s. Shell India Markets Pvt. Ltd. (supra),* wherein under similar circumstances, assessment made in the name of non-existing concern was held to be invalid and set-aside. In coming to such a decision, the Mumbai Bench of the Tribunal relied upon decisions of the Tribunal in the case of (i) M/s. Instant Holdings Ltd. (supra) and (ii) M/s. Siemens Technology Services Pvt. Ltd. (supra) and also the judgment of the Hon'ble Delhi High Court in the case of Dimension Apparels P. Ltd. (supra). In our considered opinion, having regard to the aforesaid judicial rulings and the facts of the instant case, the assessment order dated 31.01.2017 (supra), which has been made in the name of Diebold India Pvt. Ltd., the erstwhile non-existent concern, is a nullity in the eyes of law and is liable to be quashed. We hold so.

10. Now, we may deal with the objections which have been raised by the ld. DR at the time of hearing as well as in the written submissions. Firstly, it is sought to be canvassed that the omission to state the name of assessee correctly is a procedural error rectifiable u/s 292B of the Act. The aforesaid objection of the ld. DR is quite untenable and the same has been directly dealt with by the Hon'ble Delhi High Court in the case of *Maruti Suzuki Ltd., 397 ITR 681 (Delhi)*. The Hon'ble Delhi High Court by relying on its earlier

judgment in the case of *Spice Infotainment Ltd. (supra)* held that once it is found that the assessment is framed in the name of a non-existent entity, it does not remain a procedural irregularity of the nature which is curable by invoking Sec. 292B of the Act. Thus, the aforesaid objection of the ld. DR is untenable and is hereby rejected.

11. The second aspect raised by the ld. DR is that initiation of assessment proceedings has been correctly made. In our view, the same does not distract from the fact that the final assessment order, which is made in the name of the erstwhile non-existent entity, cannot be sustained merely because at the time of initiation of assessment proceedings, the erstwhile concern was in existence.

12. Thirdly, the ld. DR has referred to Sec. 170(1)(a) of the Act to justify the making of assessment in the name of erstwhile non-existent concern. In this context, there is no quarrel on the position set-out in Sec.170(1)(a) of the Act which prescribes for assessment of income in the case of succession of business, but the point that is sought to be raised before us is relating to the making of assessment. In any case, sub-section (1) of Sec. 170 of the Act is not relevant for the present. In the situation of the type before us, upon merger the erstwhile entity becomes non-existent; thus, it is a case where after merger the predecessor (the erstwhile entity) cannot be found and only the successor is available thereafter. In such a situation, the provisions of Sub-section (1) of Sec. 170 of the Act are not relevant, and instead, the same would be governed by the provisions of Sub-section (2) of Sec. 170 of the Act. The provisions of Sub-section (2) of Sec. 170 of the Act, in our view, do not conflict with the proposition that no assessment can be made in the

name of a non-existing entity. Therefore, the reliance placed by the ld. DR on Sec. 170(1)(a) of the Act is in any case wrong. Notably, this very argument has been dealt with and rejected by the Hon'ble Delhi High Court in the case of *Dimension Apparels P. Ltd. (supra)* in the following words :-

> *"6. Sections 170(1) and 170(2) of the Act do not assist the revenue in their case. The revenue does not contest that in a case of amalgamation, the predecessor (being a dissolved company) "cannot be found". Consequently, Section 170(2) applies. This provision clarifies that where the predecessor cannot be found,*
>
> > *"the assessment of the income of the previous year in which the succession took place up to the date of the succession and of the precious year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor." (Emphasis Supplied)"*
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> *7. The revenue seems to argue that the assessment is justified because the liabilities of the amalgamating company accrue to the amalgamated (transferee) company. While that is true, the question here is which entity must the assessment be made on. The text of Section 170(2) makes it clear that the assessment must be made on the successor (i.e., the amalgamated company)."*

13. Apart from the aforesaid, the Revenue has also relied on the judgment of the Hon'ble Calcutta High Court in the case of *Shaw Wallace Distilleries Ltd. (supra)*. In the case before the Hon'ble Calcutta High Court, the plea of the assessee was that the assessment was a nullity because assessee had merged with another entity prior to the assessment. The Hon'ble High Court disagreed with the assessee on the basis of the peculiar facts of the case before it. The Hon'ble High Court noted that the assessee did not bring the fact of amalgamation to the notice of the Assessing Officer; and, secondly, it

was also noted that for the subsequent assessment year, in the return of income filed by the assessee on a date even after the order passed by the Hon'ble High Court on amalgamation, assessee itself did not act upon the amalgamation. For these reasons, the claim of the assessee was not upheld. Quite clearly, the fact-situation in the case before us stands on a different footing inasmuch as, in the present case, the fact of erstwhile entity having merged with Diebold Systems Pvt. Ltd. is not in dispute because in the assessment order itself the name of the new entity has been noted by the Assessing Officer, albeit in brackets. Moreover, the fact that assessment made in the name of erstwhile non-existent company is invalid and goes to the root of jurisdiction of the Assessing Officer to make the assessment is a proposition upheld by the Hon'ble Bombay High Court itself and, therefore, even if there is a contrary proposition impliedly upheld by the Hon'ble Calcutta High Court, the same would not be binding on us inasmuch as the view of the jurisdictional High Court, as noted by us in the case of *Jitendra Chandralal Navlani & Anr. (supra)* in the earlier paras is to the contrary and, the same has to prevail. Therefore, the judgment of the Hon'ble Calcutta High Court does not help the case of the Revenue before us. Insofar as the reliance placed by the ld. DR on the decision of the Bangalore Bench of the Tribunal in the case of *GE Medical Systems (India) Pvt. Ltd. (supra)* is concerned, herein also the same has been rendered on its own facts. In any case, the proposition being canvassed is contrary to the decision of the jurisdictional High Court, it does not help the case of the Revenue. Further, the Hon'ble Karnataka High Court in the case of Intel Technology India (P) Ltd., 57 taxmann.com 159 has, by relying on the decision of the Hon'ble Delhi High Court in the case of *Spice Infotainment Ltd. (supra)*, held that framing of assessment against a non-existent entity goes to the root of the

matter and is not a procedural irregularity, but a jurisdictional defect. Be that as it may, the proposition canvassed on the basis of the decision of Bangalore bench of the Tribunal relied upon by the Revenue cannot prevail in the circumstances; firstly, in view of the judgment of the Hon'ble Bombay High Court in the case of *Jitendra Chandralal Navlani & Anr. (supra);* and, secondly, having regard to the fact that the decision of the Hon'ble Delhi High Court in the case of *Spice Infotainment Ltd. (supra)* has been approved by the Hon'ble Supreme Court by order dated 02.11.2017.

14. In view of the aforesaid discussion, we conclude by holding that the assessment made in the name of Diebold India Pvt. Ltd. is invalid inasmuch as it has been made in the name of a non-existent entity. Accordingly, the assessment order dated 31.01.2017 (supra) is hereby quashed.

15. Since we have approved the preliminary plea of the assessee and the assessment has been held to be invalid in the eyes of law, the necessity of examining the merits of the other Grounds raised by the assessee in its Memo of appeal is obviated. Thus, the appeal of the assessee is allowed, as above.

16. Resultantly, appeal of the assessee is allowed.

Order pronounced in the open court on 23rd March, 2018.

Sd/-	Sd/-
(PAWAN SINGH)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date : 23rd March, 2018

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Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, “K” Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai