

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "डी" मुंबई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI**  
**BEFORE SHRI MAHAVIR SINGH, JM AND SHRI RAJESH KUMAR, AM**  
ITA NO.4124 & 4125/Mum/2015  
(निर्धारण वर्ष / Assessment Year: 2008-09 and 2009-10)

Destimoney Enterprises Limited (formerly known as Destimoney Enterprises Pvt Ltd.)Shop No.5, Sahjeevan CHS N M Joshi Marg, Next to Yamaha Showroom, Elphinstone road, (W), Mumbai-400013	<u>बनाम/</u> Vs.	Income Tax Officer-TDS(OSD) 1(3), 8 <sup>th</sup> floor, Room No.811, K.G.Mittal Hospital Building, Charni Road, Mumbai-400002
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./PAN : AAACD5100F/MUMD13951A		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Revenue by	:	Shri Aarsi Prasad
प्रत्यर्थी की ओर से/Assessee by	:	Shri Yogesh Thar
सुनवाई की तारीख /Date of Hearing	:	16.8.2017
घोषणा की तारीख /Date of Pronouncement	:	28.8.2017

**आदेश / O R D E R**

**PER RAJESH KUMAR, A. M:**

The captioned are appeals by the assessee pertaining to assessment years 2008-09 and 2010-11. The appeals are directed against the order of the CIT(A)-59, Mumbai, dated 23.4.2015 which in turn has arisen from an order passed by the Assessing Officer dated 31.3.2011 under section

201(1)/201(1A) of the Income Tax Act, 1961(in short 'the Act). Since issue involved in both these appeals pertains to the addition on account of section 201 and 201(1A), these appeals were clubbed together, heard together and are being disposed of by this common order, for the sake of convenience.

**ITA NO.4124/Mum/2015**

2. Ground no.1 is against the upholding that the provisions for rent of Rs.2,83,91,800/- was subject to Deduction of Tax At Source under the provisions of section 194-I of the Income Tax Act, 1961.

3. A survey u/s 133A of the Act was carried out on 23.12.2008 at the business premises of the assessee at Marathon Innova, B Wind, 1<sup>st</sup> floor, Marathem Next Gen Complex, Ganpatrao Marg, Lower Parel, Mumbai-400013 during which certain discrepancies were found in the deduction of tax at source. The AO found that the assessee has not deducted TDS on Rs.2,83,91,800/- on account of provisions for rent which were charged to profit and loss account. The AO also observed that in the tax audit report bearing form no.3CD part B serial no.17(f), it is stated that the assessee declared inadmissible expenses u/s 40(a)(ia) of the Act on account of rent of Rs.2,83,91,800/-. Since TDS payable under section 194-I of Rs.64,33,582/- has not been deducted and paid and accordingly, the AO

asked the reasons for the same, which was replied by the assessee by submitting that this was not actual rent paid but only provisions created towards rent which was never paid due to pending litigation with the landlord and the assessee suo motu disallowed the same while filing the return of income u/s 40(a)(ia) of the Act.

4. Facts of the case are that the assessee identified the said property (Property) for its operations in Gurgaon and started negotiations with the Builder for the purchase of the property. However, during the course of due diligence the assessee understood that land on which this property was located was under acquisition proceedings by the Haryana State. The builder upon realization that considerable time would be consumed in the litigation agreed to lease out the said property to the assessee and also agreed to sale the property at a agreed price after getting necessary clearances. The lease agreement was executed on 20.10.2006 and under the said agreement the assessee was given a right to purchase the said property. The assessee vide letter to builder dated 25.10.2006 accepted right to purchase from the builder subject to the conditions that the builder should obtain NOC and get the property released from the proceedings of the local authority. Vide letter dated 28.5.2007 the assessee exercised its right to purchase the property and in the mean

time lease was terminated. The builder however failed to honour the commitments and assessee has to file a suit for specific performance on 3.7.2008. However, during the pendency of the suit the statutory auditors advised that the provision should be created for lease of rent to the tune of Rs.28,22,889/- and was accordingly provided in the year ended 31.3.2008 but the same was disallowed while filing the return of income u/s 40(a)(ia) of the Act. The AO rejected the contentions of the assessee by holding that the assessee was liable for u/s 194I of the Act by treating the assessee in default under the provisions of section 201 and 201(1A) of the Act and raised demand of TDS plus interest accordingly.

5. In the appellate proceedings, the Id. CIT(A) also decided the issue against the assessee by observing that the rent debited to the profit and loss account was liable for TDS u/s 194-I and now aggrieved by the order of the FAA, the assessee is in appeal before us.

6. We have carefully considered the rival submissions and perused the material placed before us including the impugned orders of authorities below. In the present case, the assessee made suo motu disallowance of provision for lease rent of Rs.2,83,91,800/- under the provisions of section 40(a)(ia) of the Act and did not claim any deduction thereof from its income. In our considered view the provision of TDS are not applicable

where there is no claim of expenditure made by the assessee and assessee has made suo motu disallowance u/s 40(a)(ia) of the Act. We find merit in the contentions of the assessee that the assessee has already made suo motto disallowance u/s 40(a)(ia) of the Act at the time of filing the return of income and paid income tax accordingly without claiming any expenditure of lease rental on the ground that the provisions were of contingent nature and were never ever paid. We therefore are inclined to set aside the order of the FAA and hold that the provisions of section 194-I of the Act are not applicable where the assessee has not claimed the deduction of the expenses by suo motu making the disallowance u/s 40(a)(ia) of the Act. The AO is directed accordingly. The ground raised by the assessee is allowed.

7. Grounds of appeal no.2 is against the upholding the order of AO that TDS was attracted on internet charges and leaseline charges.

8. During the course of assessment proceedings, the AO observed that the assessee has paid lease line charges and internet charges to M/s Advance Technologies Ltd on which according to AO TDS u/s 194-I of the Act has not been deducted. Accordingly, the AO(TDS) issued notice to the assessee which was replied by the assessee by submitting that the payment to the above said company was for the internet connection and not for use of any plant or equipments and therefore the provisions qua

TDS were not applicable either u/s 194-C or 194-I or 194-J of the Act. In support of his contention, the Id.AR relied on the following decisions :

- i) Sktcekk Communication Ltd V/s DCIT (2001) 251 ITR 53) Madras High Court;
- ii) Wipro Ltd V/s ITO (2004) 80 TTJ 191) (Bangalore Tribunal);
- iii) CIT V/s Bharti Cellur Lte CIT V/s Escotel Mobile Communication Limited, CIT V/s Hutchinson Essar Tel Ltd (2008) Unreported) Delhi High Court);

9. The AO, not finding the reply of the assessee convincing, treated the assessee in default and raised demand of tax and interest thereon by treating the assessee in default. In the appellate proceedings, the Id.CIT(A) dismissed the appeal of the assessee by holding that the provisions of TDS u/s 194I of the Act were applicable on the lease/internet charges.

10. We have carefully considered the rival contentions and perused the material placed before us including the orders of authorities below. We find that the assessee has availed internet services and paid internet /lease charges for the same. According to the AO, the said payment of lease rent/internet charges were liable to tax u/s 194-I of the Act. We find that in this case the assessee was only availed the internet connection and was not using any asset, plant or machinery which involved payment of rent. In our considered view the lease/internet charges are

only the payment for use of internet connection and these are not falling within the provisions of section 194-I ,194-C and 194-J of the Act. Moreover the case of the assessee is squarely covered by the various decisions referred to by the Id AR.Accordingly we set aside the order of Id. CIT(A) on this issue by allowing the ground raised by the assessee. The AO(TDS) is directed accordingly.

**ITA No.4125/Mum/2015**

11. The only issue raised in this appeal is against the upholding the order of AO by the Id.CIT(A) qua the internet charges and lease line charges being subject to TDS u/s 194-I of the Act.

12. We have already decided the issue in ITA No.4124/Mum/2015 for the assessment year 2008-09. The facts being the same, the findings of ITA No.4124/Mum/2015 would ,mutatis mutandis, apply to this appeal as well. Accordingly the appeal of the assessee is allowed.

13. In the result, the appeals of the assessee are allowed.

Order pronounced in the open court on 28th Aug, 2017.

Sd

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**(Mahavir Singh)**

**न्यायिक सदस्य / Judicial Member**

**(Rajesh Kumar)**

**लेखा सदस्य / Accountant Member**

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

True copy

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai