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“Authority to guarantee” paid to finance company, to compensate for losses on credit assistance, are not commission/brokerage

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In this issue:

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The Pune Tribunal in the case of John Deere India Pvt. Ltd. (“assessee”) has held that an amount paid to a finance company under a risk sharing agreement wherein the assessee (engaged in selling tractors) agreed to share stipulated percentage of losses suffered by the credit company while extending credit facilities to the assessee’s customers (mainly farmers), is not in the nature of commission/brokerage and hence, not liable to withholding tax provisions.

The assessee company was engaged in the business of selling tractors. It sold sophisticated and expensive products to its customers, mainly comprising of farmers, who did not have sufficient resources and liquidity to purchase tractors and other agricultural equipments. In order to ensure that the demand for the products continued to grow amongst the retail customers, the assessee entered into an agreement with M/s Sundaram Finance Ltd. (credit company) for providing credit facilities to its customers. Under the terms of the agreement, a stipulated percentage of the loss incurred, if any, by the credit company (on account of non-payment of loan by the borrowing farmers) would be borne by the assessee.

The Assessing Officer [AO] observed that the financial institution had provided services of sales promotion to the assessee by giving loans to its customers. Such service resulted in increase of sales of the assessee company and accordingly, the AO concluded that the entire expense incurred, being ‘Authority to Guarantee charges’, was in the nature of commission/brokerage. The AO further observed that, the definition of commission under the Act, for the purpose withholding tax provisions, was inclusive and included any payment by whatever name called, towards rendering of services. By availing services of the financial institution, the sales of the assessee had increased. Therefore, the charges incurred for such assistance is in the nature of commission/brokerage.

The Commissioner of Income tax (Appeals) [CIT(A)] dismissed the appeal of the assessee and held that the financing of products of the assessee is nothing but service to the assessee to prop up the sales of its products.

On appeal before the Income-tax Appellate Tribunal (‘Tribunal’), the assessee submitted that there was no element of service rendered in the arrangement whereby the portion of the possible losses incurred by the finance company, if any, were replenished by the assessee as part of the contractual liability. The services had been rendered by the finance company to its customers (farmers) and not to the assessee *per se*. The assessee placed reliance on the decision of the Delhi High Court in the case of CIT vs. JDS Apparels Pvt. Ltd.(TIOL-2046-HC-

DEL-IT) and the decision of the Bombay High Court in the case of CIT vs. Intervet India P. Ltd.(364 ITR 238). The assessee submitted that its relationship with the finance company was on a 'principal to principal' basis and the finance company was not acting on behalf of the assessee. Accordingly, the withholding tax provisions applicable to commission/brokerage payments would not be applicable.

The Tribunal observed that it was noticeable from the definition of the expression 'commission or brokerage' as appearing in the withholding tax provisions of the Act, that:

- a) a payment should be received by a person for services rendered only, and;
- b) such person should be acting on behalf of the other person to whom the services have been rendered (in respect of buying and selling of goods, etc)

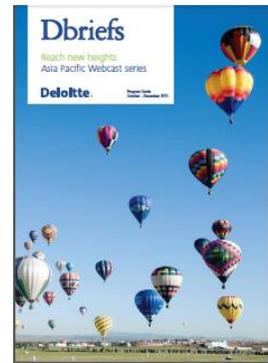
Based on the factual matrix of the case, the Tribunal held that, it was clear that there was no component of service rendered by the finance company to the assessee against recovery of portion of losses, if any. The Tribunal observed that, it was a simple business proposition whereby an arrangement had been entered into by the assessee to assist its customers to enable them ready finance of their products and simultaneously assured the finance company for recovery of losses, if any due to default in repayment by the customers.

Accordingly, based on the facts of the case and the judicial precedents cited by the assessee, the Tribunal concluded that the withholding tax provisions were not applicable to the facts of the case of the assessee.

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