GST Alert 23/2017-18
Date 8.12.2017

Taxability of Sale of Used Car by a Registered Person

Taxpayers are required to purchase Vehicles and other goods which are then used by the top management or other employees. These goods are capitalized in the books of accounts and depreciation is claimed in income tax considering them as normal business assets. In the earlier indirect tax regime (Excise and VAT) one was required to pay tax at the rate of 1% subject to maximum of Rs. 2000. However there were enough judicial precedents available which said that one is not required to pay VAT as the same was not classifiable as a transaction being in the course of trade or commerce.

Under GST regime, question is arising whether sale of goods lying in the fixed assets of a registered person will be chargeable to GST or not. We have analyzed the question in 2 parts for different classes of tax payers, same is as under:

Basic assumptions for the following opinion are as under:

a. Goods being discussed is a car
b. The registered person purchased the car and did not avail credit of the indirect taxes levied thereon

I. For a Registered Person who is not into the business of sale and purchase of used cars

A. Taxability

1. As per section 7 (1) (a) of the CGST Act, all forms of supply of goods like sale, transfer etc made for a consideration by a person **in the course of business or furtherance of business** are a "Supply"

> ***7.*** *(1) For the purposes of this Act, the expression "supply" includes—*
> *(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person* ***in the course or furtherance of business;***

407, Aaryan Workspaces, Opp. Gala Business Centre, H.L. Commerce College Rd.
Navrangpura, Ahmedabad - 380 009. Gujarat (India)
t. +91-79-400 22 628 / 29 / 30 e. info@niteshjain.co.in w. www.niteshjain.co.in

2. Term "Business" is defined in section 2 (17) of the CGST Act whereby sub clause (a) and (b) thereof is relevant for this discussion. It says that any trade or commerce done with or without an intent of profit or any activity incidental or ancillary to such trade or commerce will be termed as BUSINESS.

> *2 (17) "business" includes—*
>
> ***(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;***
>
> ***(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);***
>
> ***(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;***
>
> *(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;*
>
> *(e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;*
>
> *(f) admission, for a consideration, of persons to any premises;*
>
> *(g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;*
>
> *(h) services provided by a race club by way of totalisator or a licence to book maker in such club ; and*
>
> *(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;*

3. Selling a used car by a company which is essentially into the business of goods other than cars cannot therefore be termed as a transaction done "in the course of business or in furtherance of business, therefore on this count it won't be a SUPPLY and therefore cannot be a taxable supply. This very issue has been tested in the courts going upto the Supreme Court of India in many cases under the VAT regime. Under majority of the judgments, courts have said that sale of goods can be brought to tax only if done with an intention of doing business in those goods and not otherwise. In the case of Panacea Biotech Ltd. the issue was taxability of sale of used car under Delhi VAT and whether the same was covered in the definition of "business". Honourable

407, Aaryan Workspaces, Opp. Gala Business Centre, H.L. Commerce College Rd.
Navrangpura, Ahmedabad - 380 009. Gujarat (India)
t. +91-79-400 22 628 / 29 / 30 e. info@niteshjain.co.in w. www.niteshjain.co.in

Delhi High court in this case has held that the same will not be regarded as sale 'in connection with or incidental or ancillary to' business and hence shall not be taxable.

4. Accordingly, in our opinion as per the test laid out in section 7 (1)(a) of the CGST Act, transaction of selling goods capitalized in the books of accounts will not be a "Supply" and therefore will be not taxable under section 9 of the said act.

5. Further, section 7 (1) (d) of the CGST Act says that all activities listed in Schedule II shall also be termed as a "Supply. Clause 4 (a) of schedule II says that if goods forming part of the assets of a business are transferred under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer is also a supply of goods.

> ***7.*** *(1) For the purposes of this Act, the expression "supply" includes—*
>
> *(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.*
>
> ***Schedule II***
>
> *4. Transfer of business assets*
>
> *(a) where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person;*

6. A car which is a part of the business assets of the company as the same is capitalized in the books, if transferred, then vide section 7 (1) (d) read with Schedule II clause 4 (a) of the said Act shall be termed as a "Supply" and vide section 9 shall be a taxable supply.

7. Therefore, in our opinion, selling of car lying in the fixed assets of a registered person will be a taxable supply.

B. Valuation

1. If the car is being sold to an unrelated person then the transaction value at which it is being sold will be the value on which tax is required to be paid

407, Aaryan Workspaces, Opp. Gala Business Centre, H.L. Commerce College Rd.
Navrangpura, Ahmedabad - 380 009. Gujarat (India)
t. +91-79-400 22 628 / 29 / 30 e. info@niteshjain.co.in w. www.niteshjain.co.in

2. If the car is being sold to a related person then then the transaction value at which it is being sold will be the value on which tax is required to be paid, but it is important to note that if the transaction value is lower than its open market value then the department can challenge the same.

3. Margin scheme as prescribed in Rule 32 (5) of the CGST Rules, 2017 whereby tax in case of used cars is not payable in case the purchase value is more than the sale price, is applicable only to a dealer in used cars and not any other person, hence the same cannot be applied by any other registered person.

C. Rate of Tax payable

Rate of tax applicable on such supply of used car would be the rate applicable to the respective car type ranging from 29% (28% GST + 1% Compensation Cess) to 50% (28% GST + 22% Compensation cess)

II. For a Registered Person who is into the business of sale and purchase of used cars

In case of a registered person who is into the business of sale and purchase of used cars but also have cars capitalized in the books of accounts, everything said above will hold good and the supply of capitalized car will be taxable under GST. The only difference would be with regards to the value on which the tax is payable.

As per rule 32 (5) of the CGST Rules, 2017 Dealers of used cars have been given an option of paying tax on the gross margin between sale and purchase of a used car if it doesn't avail credit of input tax on the purchase of the car.

> *(5) Where a taxable supply is provided by a person dealing in buying and selling of second hand goods i.e., used goods as such or after such minor processing which does not change the nature of the goods and where no input tax credit has been availed on the purchase of such goods, the value of supply shall be the difference between the selling price and the purchase price and where the value of such supply is negative, it shall be ignored:*

407, Aaryan Workspaces, Opp. Gala Business Centre, H.L. Commerce College Rd.
Navrangpura, Ahmedabad - 380 009. Gujarat (India)
t. +91-79-400 22 628 / 29 / 30 e. info@niteshjain.co.in w. www.niteshjain.co.in

Provided that the purchase value of goods repossessed from a defaulting borrower, who is not registered, for the purpose of recovery of a loan or debt shall be deemed to be the purchase price of such goods by the defaulting borrower reduced by five percentage points for every quarter or part thereof, between the date of purchase and the date of disposal by the person making such repossession.

The conditions laid out in the above rule can be broken up as under:

Sr. No.	Condition	Remarks
1.	Supply of car by one person to another is taxable	Yes, as concluded above Supply of used car by a registered person is taxable
2.	Supplier must be into the business of selling and buying of used cars	Yes, in the given facts Supplier is into the business of trading of used cars
3.	Used cars being traded into must be either on 'As Such' basis or on which minor refurbishment work is done. As such means, a used car which is stocked with an intent to sell.	Yes, if following factual arrangement exists When the company purchased a new car, it was capitalized in the books. If the car was of the same brand of which he is a dealer, then the same was transferred from Stock of goods to Fixed Assets (FA). When he is about to sell, he must transfer the same from (FA) to Stock but as it would supply to self, No GST will be payable thereon. Car must be transferred at a fair market value and provisions of Section 45(2) of the Income Tax must be complied with. Then sell the used car from the stock to a new buyer.
4.	Where input tax credit has not been availed on the purchase of such used car	Yes When the car was originally purchased by the car dealer, full VAT or GST would have been charged on the invoice and as per erstwhile VAT laws as well as section 17(5) of the CGST Act, credit of Motor vehicle is specifically barred.

A dealer who is into trading of used cars and who is selling a company used car (capitalized) as discussed above fulfills all the conditions mentioned in Rule 32 (5) of the CGST Rules, 2017 hence he will be eligible to avail the margin scheme. Value to be considered as purchase value in our opinion would be the fair market value at which the car is converted from Capital Asset to Stock in hand. If the used car at a later date is then sold at a value higher then the fair

407, Aaryan Workspaces, Opp. Gala Business Centre, H.L. Commerce College Rd.
Navrangpura, Ahmedabad - 380 009. Gujarat (India)
t. +91-79-400 22 628 / 29 / 30 e. info@niteshjain.co.in w. www.niteshjain.co.in

market value then the car dealer will be tax on the margin earned and if the margin is in negative then as provided for in the said rule, no tax would be payable.

Alternate view

There is a strong possibility of a view to be taken that section 7 (1) (d) of the CGST Act is merely a classification mechanism between Goods and Services and that it doesn't expand meaning of the term "Supply". For a transaction to be termed as a "Supply" it has to be done necessarily "in the course or furtherance of business" and anything beyond it cannot be taxed under section 7 (1) (d) of the CGST Act.

If one agrees to the above view, then sale/transfer of company car will not be a "Supply" and hence will not be taxable.

Having said so, we believe that this provision will be thoroughly tested in the court of law and there is a strong possibility that the alternate view espoused above will eventually prevail, hence we strongly urge that if the stakes are worth, one should prefer taking an Advance Ruling on this issue under section 95 of the CGST Act and SGST Act.

Formulated by:
N J Jain & Associates
Chartered Accountants

CA Nitesh Jain
Managing Partner

CA Gaurav Khetan
Partner

CA Praveen Maheshwari
Partner

CA Jay Dalwadi
Partner

Disclaimer

407, Aaryan Workspaces, Opp. Gala Business Centre, H.L. Commerce College Rd.
Navrangpura, Ahmedabad - 380 009. Gujarat (India)

t. +91-79-400 22 628 / 29 / 30 e. info@niteshjain.co.in w. www.niteshjain.co.in