

Renting of Motor Cars – VAT Vs. ST

By CA Sudhir V S
& CA Ravi Kumar Somani

Introduction

Renting/Hiring of Motor vehicles has mostly been an unorganized sector with mainly individual business houses dominating the sector by operating with limited vehicles (mostly owned) covering limited geographical area and very limited outlook to grow. However, outlook of this sector is now changing with tons of investment being infused by established Indian corporates and foreign investments. In a sector where change seems good and growth seems obvious it is the responsibility of the government to ensure that uncertain fiscal policies must not create unnecessary burden on the taxpayers and shall not hinder the growth story. Currently, there is lot of confusion among the industry, trade and the taxmen on whether the activity of Renting or Hiring of a Motor Vehicle attracts Service Tax or whether it attracts Sales Tax. The confusion has only been used as a tool by the departmental officials in issuing demand notices under both the tax laws and therefore a tug of war. This article attempts to throw clarity on the issue prevailing specifically in case renting or hiring of Motor cabs. However, the principle enunciated may equally apply to the renting of other motor vehicles including the renting or hiring of special purpose motor vehicles.

Before, we begin it is of immense importance to have a practical understanding of various business models under which services of Renting of Motor Cabs is provided as precisely specified below:

- Airport Transfers or Point to Point Transfers;
- Full Day/Half Day Packages;
- Self Drive Packages;
- Outstation long distance travels with or without chauffer;
- Corporate tie-ups for business day to day travels;
- Corporate travels for employees pick-up and Drop;
- Tourism packages with vehicle with or without chauffer;
- Hotel Tie-ups for travel of guests.
- Marriage or other ceremony bookings with or without chauffer.

Back-drop of the Service Tax and VAT law

Whether the above activity of providing motor cars to the customers under different business models attract service tax or VAT is a matter of debate since long but in order to understand the governing provisions of the statute which determines its taxability we shall understand the relevant provisions in the Service tax law and the Sales tax law which governs the taxability of above services.

Value Added Tax (VAT)

It is very clear that VAT is applicable only when there is a transfer of ownership of the goods by one person to another, which a sale. However there is a extension of levy of VAT not only on sale, but also for the transaction, which have been considered as deemed sale. As per sub-clause (d) of clause 29 of article 366 of the Constitution of India transfer of the right to use any goods for any purpose for cash, deferred payment or other valuable consideration is considered as a Deemed Sale.

From the above definition, it is clear that a transaction of transfer of right to use the goods is sale, it would e very important to determine, when a transaction can be considered as transfer of right to use and not a mere license to use the goods. The guiding principles in this regard could be derived from the following decisions.

In the case of **Bharat Sanchar Nigam Limited versus UOI (2006) (SC)**, apex court held that, In order to constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

- There must be goods available for Delivery;
- There must be a consensus ad idem as to the identity of the goods;
- The transferee should have a legal rights to use the goods – consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
- For a period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute – viz. a transfer of a right to use and not merely a license to use the goods;
- Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

The principle emerging in the case of **State of A.P. vs. Rashtriya Ispat Nigam Limited (2002) (SC)** is that:

- Whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. To determine the nature of transaction, the agreement has to be read as a whole.
- Whether the person is holding the effective control of the goods is of relevance to decide whether the rights are transferred.
- Whether the transferee can make use of the goods freely during the period in use.

Service Tax (ST)

The service has been defined as any activity carried out by one person to another for a consideration, however the same does not include an activity, which is merely a deemed sale as per the Art. 366(29A) of the Indian Constitution. Further as per clause (f) to Section 66E of the Finance Act, 1994 the activity of transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods is declared as service.

Recently in case of **M/s Shiva Travels 2014-TIOL-2039-HC** Uttarakhand High court has held that the tribunal is correct in propounding the principle that, *unless the control of the vehicle is made over to the hirer and he is given possession for howsoever short a period, which the contract contemplates, to deal with the vehicle, no doubt subject to the other terms of the contract; there would be no renting.*

Further, it has also chalked out a difference between renting of a cab as per erstwhile law and hiring of the cabs that “*when a person chooses to hire a car, which is offered on the strength of a permit issued by the Motor Vehicles Department, then the owner of the vehicle, who may or may not be the driver, will offer his service while retaining the control and possession of the vehicle with himself. The customer is merely enabled to make use of the vehicle by travelling in the vehicle. In the case of a passenger, he is expected to pay the metered charges, which is usually collected on the basis of the number of kilometers travelled. These are all matters, which are regulated by the Government. Unlike the said scenario, in the case of a rent-a-cab scheme, as is clear from the very fundamental principle underlying the scheme, it is to give the hirer the freedom to use the vehicle as he pleases subject, no doubt, to the terms of the contract between the parties and he uses the vehicle as his own subject to his paying the rent which, undoubtedly, implies that he must have possession and control over the vehicle. This is the*

fundamental distinction between rent-a-cab and a pure case of hiring.” Further, it is also pertinent to bear in mind that, in the case of hiring, the hirer may refuse to provide the service to the prospective customer.”

As per Circular No. 168/ST issued by CBEC dated 15.04.2013. It is clarified that The activity of providing *pandal* and *shamiana* along with erection thereof and other incidental activities do not amount to transfer of right to use goods. It is a service of preparation of a place to hold a function or event. Effective possession and control over the *pandal* or *shamiana* remains with the service provider, even after the erection is complete and the specially made-up space for temporary use handed over to the customer.

Therefore, currently in order to tax the transaction of renting or hiring of movable goods a deeming fiction has been created under both sales tax as well as service tax law with the difference that sales tax shall be levied on renting of movable goods only if the right to use the goods has also been transferred and service tax shall be levied on renting of movable goods only if the right to use the goods has not been transferred.

Form the above it is clear that what is sale cannot be a service. The landmark judgment pronounced in the case of **Imagic Creative Private Limited 2008 (SC)**, apex court held that “A legal fiction as is well known should be applied only to the extent for which it was enacted. It although must be given its full effect but the same should not mean that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.’ It further stated that “Payments of Service Tax and VAT are mutually exclusive.”

Conclusion

From the above it can be concluded that a transfer of rights to use is said to be made if the effective control and possession is transferred and the transferee can use the vehicle freely without any restrictions as to its use also the terms of the contract holds importance in determining whether or not the rights to use the vehicle has been transferred. Therefore, facts and circumstances in each case needs to be separately analysed in order to determine taxability, further the documentation in this regard has to be clearly made to identify as to who is having the effective control and procession.

Mentioned below are certain clauses commonly used as agreed terms and conditions by the service providers in the business of renting of motor cabs which can be guiding parameters in deciding the taxability and can help in determining whether or not the effective control and possession has been transferred.

- Chauffeur will be provided along with the vehicle, who shall be authorized to ply the vehicle and will be having exclusive control over its use.
- We shall provide you a vehicle with chauffeur for your use and the said vehicle shall be under your control exclusively till the time you use the vehicle.
- Vehicle shall be given for certain no. of hours or days and the hirer is free to use it at its will.
- Vehicle shall not be taken out of vicinity of certain city, town, toll etc.
- You hereby undertake that the vehicle will be used for legally permissible uses and you will be responsible for any unauthorized use during the said period.
- Tour once commenced will strictly go as per the itinerary finalized and will not be changed as per the will of passengers.
- You shall be responsible for any cost towards vehicle Breakdown or any other damage caused to the vehicle when in your possession.
- The driver has all the rights to ask the passengers to leave the vehicle in case of any abuse or unacceptable behavior or in case of smoking, littering, soiling, damaging or mis-using the devices (technical or non-technical).
- You may travel to any destinations involving those with greater risks than others, but entirely at your risk as to cost and consequences.

(for queries and feedback mail to ravikumar@hiregange.com or sudhir@hiregange.com)