Deemed Sales

Before the discussion on deemed sales we must be well known of the general facts of sale.

Meaning of Sale

There are various definitions of the term “Sale” is generally specified in different laws and different State VAT acts. Hence we need to understand the basic concept behind the actual meaning of the term.

Supreme Court in the case of “Gannon Drunkerley” has held that the meaning of the expression ‘sale of goods’ had the same meaning as per defined by the ‘Sale of goods act, 1930’.
Sale of goods act, 1930 defines sale as a contract where one person transfers or agrees to transfer his property in goods to another person for a price.

**Elements of Sale**

Thus in the above mentioned definition these are the conditions which must be required to call a transaction as a simple sale.

- There must be a contract between the parties. As per the Indian contract act, 1872 any agreement which is enforceable by law will be considered as a contract. Hence all the conditions should require which are necessary for the construction of an agreement i.e. free will of buyer and seller etc. This contract can be written, oral, express or implied.

- There must be two distinct persons who may be either natural or artificial. A person can’t make sell to himself.

- There must be a transfer of property. Here the term transfer of property means all the rights and obligations should transfer from the seller to the buyer person.

- Transfer of property should be in goods. The meaning of goods is define in the Sale of goods act, 1930 in which the relevant section 2(7) reads as goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

- The meaning of price is defined in the Sale of goods act, 1930 which reads as money consideration for sale of goods. However many VAT Acts use the term
Supreme Court in the case of ‘Devidas Gopal Krishan’ has defined the term ‘other valuable consideration’ as Cash, Cheque, promissory note or equivalent to money. Thus anything which can be determined in money value would be covered under the term consideration.

Hence if any transaction which doesn't satisfy any of the above mentioned conditions would not be considered as a sale.

**Power to impose tax on sale**

Article 245 of Indian Constitution, India 1950 provides that Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

However the subject matter on which the authorisation is provided to make laws is specified in Article 246 of the Constitution.

As per Article 246 the parliament has exclusive power to make laws with respect to any of the matter enumerated in List 1 in the Seventh Schedule and the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule.

Entry No. 92A of List I read as ‘Taxes on Sale or purchase of goods other than newspaper, where such sale or purchase takes place in the course of Inter-State trade or commerce.’

Entry No. 54 of List II read as ‘Taxes on Sale or purchase of goods other than newspaper, subject to the provision of entry 92A of List I’
Hence State government has power to impose tax on sale of goods within that state.

**Concept of Deemed Sales**

As per the definition of sale according to Sale of Goods Act, 1930 the following transactions shouldn't be considered as a sale –

**Compulsory Acquisition for consideration**

Here the free will of Seller is missing. Hence this transaction is not satisfying the basic condition for forming a contract for sale.

**Works contract**

In case of Works contract goods are not transferred in same form. As condition of goods being transferred as goods is not satisfying, hence it shouldn't be considered as a simple sale.

**Hire Purchase Transaction**

In a hire purchase agreement the goods are transferred from seller to buyer on the same day but the ownership of such goods will be transferred only after the payment of last instalment by the buyer. Hence it shouldn't be considered as a simple sale.

So the above mentioned transactions which though appear as sale are not sale as they are missing one of the essential elements of the sale.

In order to bring such transaction in VAT net, concept of deemed sale is introduced by the amending Constitution of India. Article 366(29A) of constitution cover cases of ‘Deemed Sales’
Hence to charge tax on sale/purchase of goods as existing in Entry no. 54 of List I of the Seventh Schedule was defined by Article 366(29A) of constitution to cover up taxes on all such transactions which read as

Taxes on sale of purchase/goods shall include

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

- a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;

- a tax on the delivery of goods on hire purchase or any system of payment by Installments;

- a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

- a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

- a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;
As per the constitution of India, 1950 here are some transactions which would be considered as deemed sales

1. Works Contract

Works contract means a contract for carrying out any work in which goods and services are provided compositely and the value of goods can't be identifiable separately.

To ascertain a contract as a works contract following are the elements which should be required in a contract to consider it as a works contract

- The existence of indivisible contract must be required. It means the consideration for value of goods and services can't be identifiable separately.
- Goods must be involved in the execution of works contract. Goods must be incorporated in the works
- The property in goods should pass during the course of execution of the works.

**Computation of value of goods (taxable turnover) in a works contract**

The turnover arising in the execution of works contract the amount of taxable turnover means the total consideration paid by the dealer excluding the charges towards labour, service and other like charges.

**Total consideration paid by the dealer** \[= \text{XXX}\]

Less - Charges towards labour, service and other like charges \[= \text{XXX}\]

**Taxable Turnover for the purpose of VAT** \[= \text{XXX}\]
The Charges towards labour, service and other like charges shall include

i. labour charges for execution of works

ii. charges for planning and architects fees;

iii. charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

iv. cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract

v. cost of establishment of the contractor including cost of marketing, finance expenses and securities deposits to the extent it is relatable to supply of labour and services

vi. other similar expenses relatable to supply of labour and services;

vii. profits earned by the contractor to the extent it is relatable to supply of labour and services subject to furnishing of a profit and loss account of the works sites:

If these charges can't be ascertained by the books of accounts of the contractor then a specified percentage of total consideration for these like charges is fixed in different VAT Laws.

2. Transfer of right to use goods

In such transactions owner of the goods gives right to use the goods for a valuable consideration. However the ownership of the good is not transferred by the owner to the goods user. Hence there is no sale as there is no transfer of
title. By way of constitutional amendment in Article 366(29), a transfer of right to use has been deemed to be a sale for sales tax purposes.

By this clause of the constitution tax could be levied on transactions of leasing such as leasing of films and hiring of goods for a period, even if there is no transfer of property.

Supreme Court in ‘BSNL’ case has held that the essence of the expression ‘Right” under Article 366(29A) (d) shows that levy of tax is not on use of goods but the transfer of the right to use goods. In other words it means that right to use arises only on the transfer on such right and not merely on the actual delivery of the goods.

Hence the following attributes that should be required to constitute a transaction a transfer of right to use goods

- There must be goods available for the delivery
- the transferee should have a legal right to use that goods
- During the period for which it is to be transferred, the owner cannot transfer the right to use same goods to others.

3. Hire Purchase Transactions

Hire purchase is an alternative mode of financing where goods are transferred by a person to the user (Hirer) without transferring the ownership. Hirer has the option to get the ownership to his name when all the Installments are paid during the tenure of hire purchase agreement.
As per the Hire Purchase Act, 1972 ‘ Hire Purchase Agreement means an agreement under which goods are let on hire and under which the hirer has an option to purchase it according to the terms of an agreement under which –

- Possession of goods is delivered by the owner on a condition to pays the periodical installments for such goods.

- Goods should pass to such person only after the payment of all the Installments.

- Hirer has an option to terminate the agreement at any time before the goods so passes.

**Taxability**

Supreme Court in the case of ‘K.L. Johar & Co.’ has held that sales tax on hire purchase transactions could be levied only after the transfer of property in the goods. Here the expression transfer of property in goods emphasis is on the transfer of the goods. However as per the amending constitution relevant entry read as ‘tax on delivery of goods on hire purchase or any system of installment.’ Here it emphasis on delivery on goods. So Hire purchase transaction is subjected to tax on the exercising of the option.

As per the decision given by the Delhi high court in the case of ‘CST vs. The Motor & General Finance Ltd.’ it was held that sale takes place when the agreement is entered into and the goods are transferred and not on the payment of all the Installments.

**Taxable Turnover**
The Amount of Turnover arising in the tax period in the case of hire purchase is the total amount of the sale price that will be due and payable under the agreement irrespective of the due date and release of the payment.

4. **Transfer, otherwise than in pursuance of a contact**

As per the Sale of Goods act, 1930 there must be a condition of existence of a contract for forming a transaction as a sale. But the introduction of this entry in Article 366(29A) of the constitution read as ‘a tax on the transfer, otherwise than in pursuance of a contact, of property in any goods for cash, deferred payment or other valuable consideration’ now authorise to impose tax on transactions where is no contract between the buyer and the seller.

Therefore compulsory acquisition for a consideration will be covered under this clause.

5. **Supply of food or other article for human consumption**

After the introduction of entry no. 366(29A) (f) read as ‘a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration’, it gives the power to state legislatures to impose tax on sale of any type of human consumption article.

Cooked food is covered in the definition of goods. Hence in all the restaurant’s where cooked food is served to the customers is covered in the ambit of sales tax. Further the consideration charged by the customer cannot be split up between what was charged for food and what for service part because restaurants could not correlate the charges levied with the amenities towards
facilities like air-conditioning, bar etc and hence sales tax will be leviable on total consideration.

Tags: VAT

Recommended Read
- GST on Ex-Works Sales vis-a-vis Place of Supply
- GST on Deemed Exports

thank you rishi ji. But, some will argue that, for a short period, both the effective control and possession on that vehicle remains with owner only. So, transfer of right to use has not transferred to the customer. How can we see this?

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yes mr. venugopal..then it would be taxable as right to use the goods is one of the six concepts which are taxable as deemed sale

Reply Like

Nice... very informative...

Reply Like
Dear Rishiji, if a person or a firm transferred its right on a vehicle for a short time to another firm or person, can it be taxable under deemed sale?

Venugopal Rao, Hyd.
Section 9: Income deemed to accrue or arise in India

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GST- Sales Promotion - Circular 92 dt.7.3.19 Analysed

Treatment of sales promotion scheme under GST.