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WEST BENGAL AUTHORITY FOR ADVANCE RULING

GOODS AND SERVICES TAX

14 Beliaghata Road, Kolkata - 700015

(Constituted under section 96 of the West Bengal Goods and Services Tax Act, 2017)

Members present:

Dr Tanisha Dutta, Joint Commissioner, CGST & CX   Joyjit Banik, Senior Joint Commissioner, SGST

Preamble

A person within the ambit of Section 100 (1) of the Central Goods and Services Tax Act, 2017 or West Bengal Goods and Services Tax Act, 2017 (hereinafter collectively called ‗the GST Act'), if aggrieved by this Ruling, may appeal against it before the West Bengal Appellate Authority for Advance Ruling, constituted under Section 99 of the West Bengal Goods and Services Tax Act, 2017, within a period of thirty days from the date of communication of this Ruling, or within such further time as mentioned in the proviso to Section 100 (2) of the GST Act.

Every such appeal shall be filed in accordance with Section 100 (3) of the GST Act and the Rules prescribed there under, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

Name of the applicant	LANDMARK CARS EAST PRIVATE LIMITED
Address	Municipal Premises No 10, East Topsia Road, Kolkata, Kolkata, West Bengal, 700046
GSTIN	19AACCL4207H1ZN
Case Number	WBAAR 26 of 2023
ARN	AD191123007183J
Date of application	November 17, 2023
Jurisdictional authority (State)	Large Tax Payers Unit
Jurisdictional authority (Centre)	Chowringhree Division
Order number and date	01/WBAAR/2024-25 dated 04.04.2024
Applicant's representative heard	Mr. NITESH JAIN, Authorised Representative

1.1 At the outset, we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 (the CGST Act, for short) and the West Bengal Goods and Services Tax Act, 2017 (the WBGST Act, for short) have the same provisions in like matter except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar

provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the WBGST Act. Further to the earlier, henceforth for the purposes of these proceedings, the expression ―GST Act‖ would mean the CGST Act and the WBGST Act both.

1.2 The applicant is an authorised agent of Mercedes Benz for supply of cars, related spare parts and is also engaged in providing various services such as repairs, warranties, roadside assistance and servicing. It is responsible for facilitating the sales of Mercedes-Benz passenger vehicles, including the Mercedes-Benz EQ (Electric Cars). As submitted, the Applicant shall function as a self-employed commercial agent with the responsibility of brokering the sales of vehicles on behalf of MB INDIA. The primary objective is to facilitate and support MB INDIA's direct sales to end-customers.

1.3 The applicant has made this application under sub section (1) of section 97 of the GST Act and the rules made there under seeking an advance ruling in respect of following questions:

- 1.3.1 Whether the applicant is entitled to claim input tax credit charged and paid on inward supply of car from Mercedes Benz India which are used for demonstration purpose to the potential customer interested in buying Mercedes Benz Car, commonly known as Demo cars?
- 1.3.2 If the answer to the above is in affirmative, what would be the classification and rate of tax at the time of sale of demo car. And if the answer is negative then what would be the classification and rate of tax at the time of sale of demo cars?
- 1.3.3 Whether amount received by the applicant from Mercedes Benz INDIA towards reimbursement of ―Loss on Sale of Demo Car‖ constitute as supply? If yes, what is the classification and rate of tax of the same under GST?

1.4 The aforesaid question on which the advance ruling is sought for is found to be covered under clause (d) of sub-section (2) of section 97 of the GST Act.

1.5 The applicant states that the question raised in the application has neither been decided by nor is pending before any authority under any provision of the GST Act.

1.6 The officer concerned from the Revenue has raised no objection to the admission of the application.

1.7 The application is, therefore, admitted.

2. Submission of the Applicant

2.1 The applicant submits that he is an authorised agent of Mercedes Benz INDIA and is responsible for facilitating the sales of Mercedes-Benz passenger vehicles, including Mercedes-Benz EQ (Electric Cars). As per the agreement made between the applicant and Mercedes-Benz INDIA Pvt. Ltd. (hereinafter referred to as ‗MB INDIA'), the applicant shall be a member of a network of authorised agents. As a part of this network, the applicant shall function as a self-employed commercial agent with the responsibility of brokering the sales of vehicles on behalf of MB INDIA. The primary objective is to facilitate and support MB INDIA's direct sales to end-customers.

2.2 The nature of relationship between MB INDIA and the applicant is that of a principal and agent. MB INDIA is the principal, and the applicant acts as the agent, representing and working on behalf of MB INDIA in vehicle sales transactions. In recognition of the services provided, the applicant is entitled to receive a commission.

2.3 The applicant has entered with an Authorised Agent Agreement with MB INDIA on August 30, 2021. According to paragraph 7.5 of the said agreement, MB INDIA will make available the authorised agent with a sufficient number of Demo vehicles, which are essential for demonstrating the Contract Goods to prospective customers. The said para has further been amended by virtue of which the applicant may buy vehicles on its own account to carry out demonstration of Contract Goods.

2.4 The terms and conditions related to the above provision may be summarized as under:

- Upon the request of the authorised agent, MB INDIA may sell the Demo vehicles to the authorised agent at a discount as per the Demo vehicles Guideline issued by MB INDIA from time to time.
- The rights of title to and ownership of the Demo vehicles shall vest with the authorised agent in its own capacity and not in its capacity as an Agent.
- The authorised agent shall use the Demo vehicles only for the purpose of providing demonstration of Contract Goods.
- Upon receiving the delivery of Demo vehicle, the authorised agent shall conduct Pre-delivery Inspection (PDI).
- The authorised agent shall obtain a TC plate registration or any other applicable registration for Demo vehicles and ensure that the Demo vehicles be used for demonstration only with the TC Plate or any other applicable registration.

- The authorised agent may request MB INDIA for de-fleeting the Demo vehicle and MB INDIA shall allow de-fleeting the Demo vehicle in accordance with the applicable Demo vehicles Guideline.
- Once the Demo vehicle is de-fleeted, the authorised agent shall liquidate and sell the Demo vehicle to the end customer only and not to a reseller or a broker in its own capacity and not in the capacity as an Agent, by posting the offer for sale on Roadster platform or any other platform as may be recommended by MB INDIA.
- In case the authorised agent incurs losses on sale of Demo vehicles, MB INDIA shall reimburse the authorised agent for such losses.
- MB INDIA shall review the loss incurred/profit earned by the authorised agent on the sale of Demo vehicles during a Financial Year. Any profit and loss on Demo vehicles shall be reconciled for the all Demo vehicles sold by the authorised agent during the Financial Year and not per vehicle basis. In case authorised agent earns profit on sale of Demo vehicles for the Financial Year in which MB INDIA has reimbursed the authorised agent for the loss incurred in any quarter, MB INDIA shall raise a claim on the authorised agent of an amount equivalent to amount which exceeds the losses of the authorised agent for that Financial Year.
- If a demo car has not completed the required number of kilometers as per the policy, the demo discount initially provided will be reversed with GST interest as a cost.

2.5 After the above exercise is completed and if there is a loss on totality basis, MB INDIA reimburses the same to the applicant. The applicant submits that it issues a Tax Invoice to MB INDIA against such reimbursement amoun and charges GST @ 18% (IGST or CGST + SGST) considering it as a supply of services in terms of Section 7(1A) of the GST Act and classifying the service vide Schedule II entry 5(e) of the GST Act.

ADMISSIBILITY OF INPUT TAX CREDIT ON PURCHASE OF DEMO CAR:

2.6 The applicant, in respect of admissibility of input tax credit on inward supply of demo car from MB INDIA has contended as follows:

2.6.1 These demo cars are purchased from MB INDIA at a discounted price, with the GST liability duly paid during these transactions. Upon purchase, the applicant records demo cars as purchase of inventory (Stock in Trade) in its books of accounts. When these cars are sold, they are removed from the inventory and entire sale proceeds are accounted for in Sales account.

2.6.2 Presently, the applicant, while filing returns in FORM GSTR-3B, claims the ITC on purchase of Demo cars and subsequently reverses the same in the same month in temporary ITC reversal. In other words, when the applicant purchases a demo car, it avails the ITC in column 4(A)(5) of GSTR 3B and then immediately reverses the same in 4B(2) column of GSTR 3B due to legal confusion in the minds of the applicant.

2.6.3 Further when demo car is eventually sold, the applicant considers the demo car as old and used motor vehicle and therefore follows the margin scheme specified in Notification No. 8/2018-Central Tax (Rate) dated 25.01.2018.

2.6.4 The applicant submits that in the motor vehicle industry, a demonstration vehicle is an indispensable tool for promoting sales. It allows potential customers to experience the vehicle first-hand through test drives, helping them make informed purchase decisions. Demo vehicles provide customers with the opportunity to take a test drive, which is a critical step in the car buying process. This first-hand experience can significantly influence a customer's decision to purchase a vehicle. Motor vehicle dealers are typically required to acquire demonstration vehicles from their principal supplier. These vehicles are acquired as a business necessity to support the dealership's sales and marketing efforts.

2.6.5 The applicant submits that sub-section (1) of section 16 of the GST Act entitles every registered person to take ITC on purchase of goods if the same are used in the course or furtherance of the business. In the present case, the applicant has procured demo cars with the clear intent of using them for test drives and in the furtherance of their business activities.

2.6.6 According to the applicant, any activity conducted with the purpose of achieving business objectives, ensuring business continuity, and promoting business stability inherently qualifies as an activity in the course or furtherance of business. Given that the applicant is an agent for sale of cars, providing demo cars becomes an essential activity to enhance sales, advance business interests, and ensure business continuity. Hence, it is reasonable to state that procuring demo vehicles is undeniably in the course of furtherance of business. Therefore, the applicant meets all the conditions specified in section 16(1) for claiming ITC on the procurement of demo vehicles.

2.6.7 The applicant further submits that Section 17(5)(a) of the GST Act which restricts availment of ITC on motor vehicles purchased by a taxpayer even though they may be used in the course of furtherance of business is not applicable in his case on the following reasons:

- Section 17(5)(a)(A) does not specify a timeline for when the purchased car must be

sold. It simply requires that the intent to resell the car exists. When a reseller acquires a car, their clear intent is to resell it as promptly as possible. Since the car dealers/agents are explicitly involved in the buying and selling of cars, there is no dispute regarding their eligibility for ITC, including for demo cars used in the process of selling cars and subsequently sold.

- As per the demo car policy, it is mandatory for the applicant to purchase demo cars, use them as demonstration / test drive vehicles and sell them after they have been used for a specified mileage or periods, as referred in the policy. Failure to comply with this requirement could disrupt the applicant's business.
- As per section 17(5)(a)(A), input tax credit on motor vehicles shall not be allowed except when they are used for further supply of such motor vehicles. The term ‗such‖ refers to the things or goods referred earlier in the sentence, in this case the motor vehicle. Therefore, 'such' in "further supply of such motor vehicles" refers to the specific motor vehicle that has been acquired and encompasses all vehicles acquired for the purpose of resale, including demo vehicles. As per the Merriam Webster dictionary – *Such can mean something similar as indicated earlier.* Collins Dictionary defines the word ‗Such' with following description:

  You use such to refer back to the thing or person that you have just mentioned, or a thing or person like the one that you have just mentioned. You use such as and such...as to introduce a reference to the person or thing that has just been mentioned.
- Allahabad High Court in the case of Mohan Lal v. Grain Chamber Ltd., AIR 1959 All 276 has held as follows :

  "In fact, it appears to us that the word „such" is used before a noun in a latter part of a sentence, the proper construction in the English language is to hold that the same noun is being used after the word „such" with all its characteristics which might have been indicated earlier in the same sentence".
- In the case of CWT v. Kishan Lal Bubna, (1994) 1 SCC 60 [Date of decision: 21-9-1993] honourable Supreme Court was dealing with interpretation of Wealth Tax Act, 1957 wherein the term "Such assets" was up for its consideration. The apex court said as under:

  The words "such assets" in sub-clause (iti) do, no doubt, refer to the assets described in clause (a) in the sense that they mean "those assets". But the use of the words "such assets" does not imply that it is only the value on the valuation date of the assets that were actually transferred which has to be taken into account and not of any assets to which the transferred assets may have been converted.
- In case of Custodian Evacuee Property v. Rabia Bai, (1976) 4 SCC 270: AIR 1976 SC 2557 [Date of decision: 19-8-1976], the Hon'ble court was considering

interpretation of the phrase "Such cash balances" in Administration of Evacuee Property Act, 1950, S. 14(1)(b) and said:

The expression "such cash balances" used in S. 14(1)(b) cannot be interpreted so as to cover total cash deposits with the Custodian. The use of the word "balances" is significant. The connotation of the term "balances" is well known. According to Webster's Dictionary, it means the difference, if any, between the debit and credit side of an account". It is the result of a comparative reckoning. The expression "cash balances" in clause (6) therefore, has to be construed as the excess of credits over debits. The word "balances" appears to have been advisedly used in preference to "deposits" because the intention was that only such amount in deposit with the Custodian should be transferred to the compensation pool which would be in excess of the amounts required for meeting the due claims against the evacuees or their properties. It is thus clear that what can be directed to be transferred to the compensation pool by the Government under S. 14(1)(b) is the "cash balances" and not the total cash deposits with the Custodian.

- In the case of Pt. Chet Ram Vashist v. Municipal Corpn. of Delhi, (1995) 1 SCC 47: AIR 1995 SC 430 [Date of decision: 26-10-1994] the Hon'ble court was considering interpretation of the term "Such condition" in Delhi Municipal Corporation Act, 1957 (66 of 1951) - S. 313 — Delhi (Control of Building Operations) Ordinance, 1955 - Cl. s para 3(iv):

  The expression, 'such conditions' has to be understood so as to advance the objective of the provision and the purpose for which it has been enacted. The Corporation has been given the right to examine that the layout plan is not contrary to any provision of the Act or the rules framed by it. But the power cannot be construed to mean that the Corporation in the exercise of placing restrictions or imposing conditions before sanctioning a layout plan can also claim that it shall be sanctioned only if the owner surrenders a portion of the land and transfers it in favour of the Corporation free of cost. That would be contrary to the language used in the section and violative of civil rights which vests in every owner to hold his land and transfer it in accordance with law. Such condition amounts to transfer of ownership and not merely transfer of right of management. The two rights, namely, of ownership and of management, are distinct and different rights. (Paras 4 and 5).

- In the given facts, motor vehicle which is purchased by the applicant remains the same make and model motor vehicle at the time of its sale, the provision doesn't prefix the word ‗motor vehicle' with the word ‗new', it merely prescribes that the person should use the motor vehicle in further supply of same vehicle.
- Above discussion can be understood in a simpler manner by following table:

Condition	Whether fulfilled	Detailed reasoning
Motor vehicles for transportation of persons	Yes	Fact that all cars of Mercedes are only for use for transportation of persons is not in dispute
having approved seating capacity of not more than thirteen persons (including the driver)	Yes	All Mercedes cars which are up for advance ruling are of less then 14 persons capacity
except when they are used for making further supply of such motor vehicles	Yes	Fact that the applicant is an authorised dealer of demo cars is proven by the agreement it has with MB INDIA. Car which is purchased from MB INDIA is sold as the same make an model as was purchased, so the purchased car is used for supply of same car

2.7 The applicant submits that the authorities for advance ruling of different states including the state of West Bengal have taken the view that input tax credit shall be allowed in respect of purchase of demo vehicle. The applicant, in this regard, has placed his reliance on the following rulings:

(i) Toplink Motorcar (P.) Ltd., (2022) 1 Centax 261 (A.A.R. -GST - W.B.) = 2022 (67) G.S.T.L. 501 (A.A.R. - GST - W.B.)

(ii) A.M. Motors, 2018 (18) G.S.T.L. 93 (AAR - Kerala)

(iii) Chowgule Industries (P.) Ltd., 2019 (27) G.S.T.L. 272 (AAR - GST)

2.8 The applicant has submitted that in case of M/s Khatwani Sales and Services LLP, 2021 (47) G.S.T.L. 525 (AAR - GST - MP), the hon'ble authority for advance ruling, Madhya Pradesh and in case of Platinum Motocorp LLP, 2022 (61) G.S.T.L. 375 and BMW INDIA Pvt. Ltd., 2022 (63) G.S.T.L. 107, the hon'ble appellate authority for advance ruling, Haryana have taken a contrary view. However, the common factor in all the cases was that the applicant was capitalizing the cars in its books of accounts and claiming depreciation. Whereas, in the case of the applicant, the cars are booked as stock in trade and therefore above rulings cannot be applied to the facts of the instant case. Further, in case of AAAR of BMW, the difference was that they were registered as a State administered taxpayer for running a training center for the training of Engineers and Marketing professionals etc. and hence, the same can also not be applied to the instant case.

2.9 The applicant further draws attention to the provisions of the Motor Vehicle Act and the rules made there under and summarizes such provisions as under:

a. A dealer is required to take a trade certificate for operating the business of car dealer.

b. Car dealer is exempt from registering a car; he can run the car with him under the TC plate.

c. He can use the TC plate car for reasonable demonstration purposes.

d. Word ‗Reasonable' is not defined in the law or rules, however it is practically understood to be the city limits.

CLASSIFICATION: REIMBURSEMENT OF LOSS ON SALE OF DEMO CAR

2.10 In order to determine the taxability and classification of demo car loss reimbursement by MB INDIA, the contention of the applicant is as follows:

2.10.1 As per Clause (1)(a) of the Section 7 of the CGST Act, 2017, all kinds of supply of goods or services made or agreed to be made for a consideration by a person in the course or furtherance of business is to be treated as supply. Section 7(1A) of the GST Act, 2017 read with Schedule-II provides a list of activities of transactions which are to be treated a supply of services or goods. It is important to note that the activities or transaction which are treated as a supply as per sub-section (1) can only be classified as supply of goods or services as per Schedule-II. Therefore, for these activities to become supply, firstly it should pass the following conditions specified in Section 7(1)(a):

(a) there must be a supply;
(b) the supply must be of goods or services or both;
(c) there should be a consideration for such supply;
(d) the supply should be in the course or furtherance of business.

2.10.2 Therefore, if any person agrees to an obligation to refrain from an act or tolerate any act or situation or to do an act which also satisfies the conditions of Section 7(1), then only it can be treated as supply of service under clause 5(e) of Schedule-II read with Section 7(1A).

2.10.3 In the present case, as mentioned in ‗demo car loss sharing' clause of demo car policy, when a loss is incurred at the time of selling a demo car, MB INDIA reimburses this loss to the applicant. Therefore, it can be reasonably concluded that, as per the agreement, the applicant is initially bearing the loss and subsequently recovering it from MB INDIA. This aligns with the concept of 'tolerating an act or a situation' as encompassed in the expression of bearing a loss against the agreed consideration.

2.10.4 In view of the above and in consultation with MB INDIA, the applicant is issuing tax invoice along with GST at the rate of 18% to recover the loss amount from the MB INDIA.

However, the applicant is of the view that such transaction should be treated as a part of the main supply, and hence, MB INDIA is required to issue a credit note for the same. The detailed provisions for this are discussed below:

2.10.5 In the present case, the initial invoicing for the demo car is based on the agreed pricing. Subsequently, following the guidelines in MB INDIA's demo car policy, the applicant is required to sell the demo car in the market after a specified holding period of 3 to 6 months. This sale can result in either a profit or a loss. If a loss occurs during the sale, MB INDIA commits to reimburse this loss. Conversely, if a profit is realized, MB INDIA retains the right to recover this profit.

2.10.6 It is essential to understand that in both situations - the reimbursement of losses and the recovery of profits - these financial transactions are inherently linked to the sale of the demo car. Hence, rather than treating these transactions as separate and potentially taxable supplies of services under the category of 'tolerating an act', MB INDIA should issue specific Credit Notes in the case of a loss incurred during the demo car sale and Debit Notes when a profit is realized in alignment with the provisions of Section 34 of the GST Act.

3. Submission of the Revenue

The concerned officer from the revenue has not expressed any view on the issue raised by the applicant.

4. Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorised representative of the applicant during the course of personal hearing. The applicant has raised three questions in the application made in FORM GST ARA-01. We are going to deal with the issues one by one.

4.2 The first question is related to admissibility of input tax credit on purchase of motor vehicles which are initially used by the applicant for demonstration purpose and thereafter supplied by him. In the case of Toplink Motorcar (P.) Ltd., as referred by the applicant, the applicant was engaged in supply of motor vehicles where the applicant, in addition to purchases of motor vehicles which were subsequently supplied to customers, also made purchases of vehicles which were used as demo cars for providing trial run/demonstration to the customers. The demo vehicles were kept by the applicant only for a limited period of time and were supplied thereafter. This authority held that the applicant would be eligible to avail

input tax credit on purchases of demo vehicles. However, in the instant case, the business activities of the applicant are not identical with the aforesaid case. Here, the applicant is not engaged in trading of motor vehicles. In the case in our hand now, the applicant has entered into an agreement with MB INDIA to provide facilitation services for sale of motor vehicles where the applicant acts as a self-employed commercial agent with the responsibility of brokering the sales of vehicles on behalf of MB INDIA. Admittedly, the supply of motor vehicles to the end-customers is made by MB INDIA.

4.3 The applicant has argued that it purchases demo vehicles to provide facilitation services to MB INDIA and such purchases are undeniably made in the course or furtherance of business. The applicant is therefore entitled to take credit of input tax on purchase of demo vehicles. Sub-section (1) of section 16 entitles a registered person to take input tax credit on supply of inputs as well as capital goods made to him subject to certain conditions and restrictions which have been prescribed. However, sub-section (5) of section 17 of the GST Act overrides sub-section (1) of section 16 and restricts availment of input tax credit under certain scenarios meaning thereby input tax credit may be denied even in cases where sub-section (1) of section 16 entitles a registered person to take input tax credit. One of such restriction as specified in clause (a) of sub-section (5) of section 17 limits the scope of input tax credit with respect to motor vehicles. The same is reproduced below for reference:

"(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub- section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;"

4.4 In other words, input tax credit on motor vehicles used for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), can be availed only when such motor vehicles are (i) supplied further, or (ii) used for transportation of passengers, or (iii) used for imparting training on driving such motor vehicles. The applicant has submitted that the vehicles purchased by him for demonstration purposes qualify the specified seating capacity and the applicant also makes further supply of such vehicles, though at a later point in time. The applicant contends that there is no time limit prescribed in this regard for making such further supplies so as to impose restriction under section 17(5)(a)(A) of the GST Act. It is therefore imperative to decide the issue in terms of the condition laid down in section 17(5)(a)(A) i.e., whether the purchases of vehicles

used for demonstration and test drive purpose and subsequently supplied can be regarded as purchases made for further supply of such vehicle.

4.5 The business model of the applicant delineates that the demo vehicles are initially kept by the applicant for a certain period of time as mandated by its principal namely MB INDIA. The applicant contends that though he has entered into an agreement to carry out the responsibility of brokering the sales of vehicles as an agent for which he receives commission from the principal, purchases of vehicles from its principal for providing demonstration/ test drive facility to the prospective buyers are made in its own account whereby rights of title to and ownership of the Demo vehicles vest with the applicant. The applicant, after receipt of the demo vehicles, records the same as purchase of inventory (Stock in Trade) in its books of accounts and when the cars are sold, they are removed from the inventory and entire sale proceeds are accounted for in Sales account.

4.6 The applicant maintains the stock of the demo vehicles for a specified period of time and thereafter supplies the same which may be made at a price lower than the purchase value of the said vehicle. However, the provisions of the GST Act nowhere specifies that input tax credit shall not be available in respect of any outward supplies which is made at a price lower than its procurement value. We like to reiterate that section 17(5)(a)(A) restricts input tax credit in respect of motor vehicles, with a specific seating capacity, for transportation of persons except when they are used for further supply of such motor vehicles. We are of the view that the word ‗such' as used in the expression ‗further supply of such vehicles' relates to the vehicle only that was purchased. In our considered opinion, the fact that the condition of a demo vehicle at the time of its further supply has undergone some deterioration does not detract from the reality that the vehicle when supplied by the applicant has ceased to be such vehicle that was purchased. The demo vehicles are purchased all along for further supply with the condition that they will be kept for a specific period of time. We therefore hold that restriction of input tax credit as imposed in section 17(5)(a)(A) of the GST Act is not applicable on purchase of demo vehicles which are supplied by the applicant after the specified time for providing test drive facility.

4.7 We now come to the next issue which is related to classification and rate of tax at the time of sale of demo car. We find that Chapter 87 of the CUSTOMS TARIFF ACT,1975 deals with ‗vehicles other than railway or tramway rolling-stock, and parts and accessories thereof'. Further, Chapter 8702 covers ‗motor vehicles for the transport of ten or more persons, including the driver'. Furthermore, Chapter 8703 covers ‗motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars'. As we have expressed our view in affirmative in respect of

admissibility of input tax credit on purchase of demo vehicles, we are of the opinion that there would be no change of classification of the demo vehicle, at the point of sale by the applicant.

4.8 In regard to rate of tax of demo car, we hold that the outward supply of demo car would attract same rate of tax of its inward supply subject to the provision of section 14 of the GST Act. The rate of tax of motor vehicle under Chapter 8702 and 8703 is as follows:

Chapter	Description	Rate of tax
8702	Motor vehicles for the transport of ten or more persons, including the driver [other than buses for use in public transport, which exclusively run on Bio-fuels]	Central Tax @ 14% + State Tax @ 14% + applicable cess
8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars [other than Cars for physically handicapped persons]	Central Tax @ 14% + State Tax @ 14% + applicable cess

4.9 The last issue left with us is to decide whether the amount received by the applicant from MB INDIA towards reimbursement of ―Loss on Sale of Demo Car‖ would constitute as supply or not. To analyze the issue, we may have a brief reiteration of the submission made by the applicant in this regard. The fact as stated by the applicant is that when the applicant suffers any loss at the time of selling a demo vehicle, such is compensated by MB INDIA as per the agreed terms and condition. The applicant submits that although he is issuing a tax invoice to MB INDIA and charging tax @ 18% considering it to be a supply of services made by him for 'tolerating an act or a situation', the reimbursement of losses is inherently linked to the sale of the demo car and therefore MB INDIA should issue a Credit Note in this scenario in lieu of treating these transactions as a separate supply of services made by the applicant.

4.10 ‗Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' is a Declared Service as per clause (e) of section 66E of the Finance Act, 1994. Similar activities are classified as supply of services in para 5 (e) of Schedule II of the GST Act. Therefore, where one person, pursuant to an agreement, agrees to an obligation to tolerate an act, such would be treated as a supply of services under the GST Act. The Tax Research Unit, Department of Revenue, Ministry of Finance vide Circular No. 178/10/2022-GST dated 03.08.2022 has clarified that „*Service of agreeing to the obligation to refrain from*

an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration." The said circular further clarifies that *„one of the parties to such agreement/contract (the first party) must be under a contractual obligation to either (a) refrain from an act, or (b) to tolerate an act or a situation or (c) to do an act. Further some "consideration" must flow in return from the other party to this contract/agreement (the second party) to the first party for such (a) refraining or (b) tolerating or (c) doing.*" It has also been clarified that *„The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a „supply" within the meaning of the Act, otherwise it is not a "supply"."*

4.11 It thus appears that any activity or transaction as specified in para 5(e) of Schedule II of the GST Act would constitute a supply of services if the said activity or transaction fulfills two parameters, (i) there must be a "consideration", and (ii) the activity or transaction is made or agreed to be made "in the course or furtherance of business". We like to mention that the applicant himself has expressed the same view. [refer para 2.10.2]

4.12 The expression ‚consideration' has been defined in clause (31) of section 2 of the GST Act as follows:

"consideration" in relation to the supply of goods or services or both includes-

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

4.13 One of the key elements of ‗consideration' that we find is the monetary value in respect of, in response to, or for the inducement of, the supply of goods or services or both. The Hon'ble Customs, Excise & Service Tax Appellate Tribunal, Kolkata in the case of MNH Shakti Limited -vs- Commissioner, Central Goods and Service Tax & Central Excise, Rourkela has observed that *„A distinction needs to be drawn between a consideration under a contract and the compensation or damages under a contract. The compensation- either liquidated or unliquidated cannot be equated with the consideration. While consideration is a result of execution of the contract, the damages are a result of frustration of the contract.‟*
The Hon'ble Tribunal further observed as follows:

"The question of tolerating something and receiving a compensation for such tolerance pre-supposes that:
a) the person had a choice to tolerate or not;
b) the person chose to tolerate;
c) such tolerance was for a consideration as per an agreement (written or otherwise) to tolerate;
d) the tolerance was a taxable service."

4.14 In the case at hand, the applicant has entered into an agreement with MB INDIA with a specific condition towards ‗Demo Car Loss Sharing‖ knowing very well that it may suffer a loss at the time of selling of demo vehicle since the vehicle would have undergone some deterioration while providing test drive facility to the prospective buyers. In other words, MB INDIA enters into the agreement with a promise to compensate where the applicant would suffer a loss on sale of demo vehicle. This compensation is paid as a result of the contract and therefore would qualify to be a ‗consideration'. In *Fazaladdin Mandal vs Panchanan Das (AIR 1957, CAL 92)*, the Hon'ble High Court at Calcutta held that *"Consideration is the price of a promise, a return or quid pro quo, something of value received by the promisee as inducement of the promise. An act done or forbearance made in return for a unilateral promise is a sufficient consideration to support the promise."* We are therefore of the view that the applicant has entered into the agreement to tolerate the act of suffering loss for a consideration. Undisputedly, the applicant has chosen to tolerate the act for a consideration as per the agreement and has agreed to tolerate the act in the course or furtherance of the business. We therefore hold that the applicant receives consideration in the form of compensation from MB INDIA against supply of services of agreeing to tolerate the act of suffering loss. We find that ‗agreeing to tolerate an act' having SAC 999794 is classifiable under ‗Other Miscellaneous services' and is taxable @ 18% vide serial number 35 of Notification No. 11/2017-Central Tax I(Rate) dated 28.06.2017, as amended.

In view of above, we rule as under:

RULING

Question: Whether the applicant is entitled to claim input tax credit charged and paid on inward supply of car from Mercedes Benz India which are used for demonstration purpose to the potential customer interested in buying Mercedes Benz Car, commonly known as Demo cars?

Answer: The applicant is entitled to claim input tax credit charged and paid on inward supply of car which are used for demonstration purpose and supplied further after a specified time period.

Question: If the answer to the above is in affirmative, what would be the classification and rate of tax at the time of sale of demo car? And if the answer is negative then what would be the classification and rate of tax at the time of sale of demo cars?

Answer: The vehicle would be classified under Chapter 8702 or 8703, as the case may be and its outward supply would attract same rate of tax of its inward supply subject to the provision of section 14 of the GST Act.

Question: Whether amount received by the applicant from Mercedes Benz India towards reimbursement of ―Loss on Sale of Demo Car‖ constitute as supply? If yes, what is the classification and rate of tax of the same under GST?

Answer: The amount received by the applicant from Mercedes Benz India towards reimbursement of ―Loss on Sale of Demo Car‖ shall be regarded as consideration received against supply of services of ‗agreeing to tolerate an act' (SAC: 9997974) and would be taxable @ 18%.

(TANISHA DUTTA)
Member
West Bengal Authority for Advance Ruling

(JOYJIT BANIK)
Member
West Bengal Authority for Advance Ruling

Place: Kolkata
Date: 4th April, 2024

To,

LANDMARK CARS PRIVATE LIMITED

Municipal Premises No 10, East Topsia Road,

Kolkata, West Bengal, 700046

Copy to,

(1) The Principal Chief Commissioner, CGST & CX, 180, Shantipally, R.B.Connector, Kolkata-700107

(2) The Commissioner of State Tax, West Bengal, 14, Beliaghata Road, Kolkata-700015

(3) The Special Commissioner, Large Tax Payer Unit, 14, Beliaghata Road, Kolkata-700015

(4) The Commissioner, Kolkata North Commissionerate, CGST & CX, 180, Shantipally, R.B.Connector, Kolkata-700107

(5) Office