



W.A.Nos.2638 of 2019 etc. and WP. Nos.9597 of 2019 etc. cases

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.01.2024

CORAM

**THE HONOURABLE MR.JUSTICE R.MAHADEVAN
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

**W.A. Nos.2638, 2639, 2640, 2646, 2689 of 2019, 2929 of 2021 and
W.P. Nos.9597, 18645, 19157, 19782, 20781, 20831, 20834, 20872, 22420 and
33770 of 2019, 114, 9947 of 2020 and
C.M.P. Nos.16961, 16964, 16971, 16972, 17004, 17318 and 19848 of 2021
and
W.M.P. Nos.10201, 17969, 17974, 18549, 19305, 19967,19965, 20031, 20035,
20040, 20078, 20079, 21778, 21783, 27677, 34264 of 2019 and 139,
12100 of 2020**

W.A. No.2638 of 2019

The Principal Commissioner,
Office of the Principal Commissioner of CGST and Central Excise,
Chennai North Commissionerate,
No.26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034. .. Appellant

Vs.

M/s.Wunderbar Films Private Limited,
Rep. by Mr.S.Vinod Kumar, Director,
No.13/6, 4th Floor, Jagannathan Road,
Chennai-600 034. ..Respondent

PRAYER: Writ Appeal filed Clause 15 of the Letters Patent praying to set aside the order of this Court W.P.No.29206 of 2018 dated 16.04.2019.

Appellant : Mr.V.Sundareswaran

Respondent : Mr.Joseph Prabakar



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WP. No. 9597 of 2019

M/s.Sri Thenandal Films
No.8, Devar Garden
80 Feet Road, Saligramam
Chennai - 600 093

rep. by its Proprietor N.Ramasamy

... Petitioner

v.

The Additional Commissioner
Office of the Commissioner of GST and Central Excise
Chennai South Commissionerate
692 MHC Complex
Nandanam, Chennai

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari to call for the records pertaining to the passing of the Order-in-Original No.07-08/2019-ADC dated 31.01.2019 in Files C.No.V/15/131/2018-CS Adj & C.No.V/15/45/2017 - CS Adj by the respondent herein and to quash the same.

Petitioner : Mr.N.Viswanathan

Respondent : Mr.V.Sundareswaran

COMMON JUDGMENT

Challenging the common order passed by the learned Judge in a batch of writ petitions, the Revenue has preferred the present writ appeals, insofar as the learned Judge, while remanding the matters to the adjudicating authority by



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setting aside the show cause notice(s) and orders-in-original, has expressed her views on merits, thereby imposing fetters on the powers / authority of the adjudicating authority in carrying out the adjudication on remand.

2. All the writ petitions are filed by the petitioners / assessees, challenging the show cause notice(s) / orders-in-original passed by the adjudicating authority. Since the issue involved herein is the same as subject matter in the writ appeals, hence all these writ petitions were tagged with the present batch of writ appeals and posted for joint hearing, as per the administrative order dated 14.12.2022 of the Hon'ble Acting Chief Justice.

3. Heard the learned counsel appearing for all the parties and perused the materials available on record.

4. The challenge before the learned Judge was to the show cause notice(s) proposing to levy or the orders-in-original levying tax on assignment of certain rights in the cinematograph films as representing temporary transfer or permitting use or enjoyment of intellectual property i.e., copyright in the instant case.



5. It was submitted by the respondents in the writ appeals that the impugned notices / orders levied tax, not only on the temporary transfers, but also on the perpetual transfers, which are permanent in nature and thus, outside the purview of the levy of service tax. It was further submitted that the levy of service tax in respect of copyright was limited to temporary transfers or permission to use or enjoy copyright as defined in the Copyright Act, 1957. The perpetual transfers being permanent rather not temporary, the show cause notices proposing to levy tax and the impugned orders of adjudication levying tax are without jurisdiction.

6. On the other hand, the Revenue submitted that the agreements of perpetual transfers are a sham and a make believe arrangement to escape the levy under the Service Tax Act. It was their further case that the transfer of copyright is temporary in nature thereby attracting the charge under the Finance Act 1994.

7. The learned Judge had found that the Respondents in the writ appeals are engaged in the business of production of cinematograph films and in their regular course of business, they entered into various agreements with distributors, exhibitors and television channels assigning some or all of the



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copyright for broadcast and exhibition of the cinematograph films either produced or purchased by them. The rights include satellite television broadcast, direct to home broadcast, direct satellite service etc. The assignments made by the respondents in the writ appeals, are either perpetual or temporary in nature, which would vary depending on the rights assigned under each contract / agreement. Admittedly, the respondents in the appeals, in respect of the temporary transfers, have discharged sales tax liability. Therefore, the learned Judge remanded the matters to the adjudicating authority for fresh consideration. While so, the learned Judge made certain observations on the merits of the show cause notice(s) / adjudication orders, which are apparently causing prejudice to the Revenue and thus, the same are challenged in the present batch of writ appeals.

8. Before proceeding further, it may be relevant to point out that before a Division Bench of this Court in *AGS Entertainment Private Limited v. Union of India* [2013 (32) STR 129 (Mad.)] a challenge was made to the vires of Section 65 (105) (zzzzt) of the Finance Act, 1994 and it was held that the levy of Service Tax on temporary transfer or permitting the use or enjoyment of any copyright as defined under the Copyright Act was valid. The relevant portions of the Division Bench Order are extracted below:



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"59. Whether "temporary transfer of copyright or permission to use or enjoyment" amounts to sale of "goods" or "deemed sale" within the meaning of Article 366(29A) of the Constitution, as contended by the Petitioners is to be examined, keeping in view the normal business practice in the film industry and in the light of the principles laid down by the Hon'ble Supreme Court in various decisions upholding the levy of service tax."

"110. Conclusion: We hold that the variant modes of business transactions between the producer and distributor, distributor and sub-distributor or area distributor or exhibitor (theatre owner) are not "sale of goods" to fall under Entry 54 List II or Entry 92A List I. By resorting to Entry 97 of List I Residuary Entry to levy service tax, the Parliament is within its legislative competence and Section 65 (105) (zzzzt) is not ultra vires the Constitution. From the production of the cinematograph film till it is exhibited, there are host of commercial activities. Service tax is the value added tax, which applies to the business transactions for consideration involving commercial activities. Over all, there is a huge rise in business of film industry and huge money is involved. The temporary transactions of copyrights or the permission to use or enjoyment of the copyright cannot be brought either under Entry 54 of List II or Entry 92A of List I. Applying the ratio of the decisions of the Supreme Court, we hold that the Parliament is well within its legislative competence in levying service tax resorting to Entry 97 of List I."

8.1. That apart, the relevant provisions as they stood prior to 01.07.2012 read as under:

(55a) "intellectual property right" means any right to intangible property, namely, trade marks, designs, patents or any other similar intangible property, under any law for the time being in force, but does not include copy right;

(55b) "intellectual property service" means-

(a) transferring, [temporarily]; or

(b) permitting the use or enjoyment of, any intellectual property right;

.....

105 (zzr) to any person, by the holder of intellectual property right, in relation to intellectual property service;

.....



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105 (zzzzt) to any person, by any other person, for-

(a) transferring temporarily; or

(b) permitting the use or enjoyment of,

any copyright defined in the Copyright Act, 1957 (14 of 1957), except the rights covered under sub-clause (a) of clause (1) of section 13 of the said Act;

8.2. The above provisions were rendered inapplicable with effect from

01.07.2012 whereby the following proviso was inserted to Finance Act, 1994 :

"65. Definitions

In this Chapter, unless the context otherwise requires,-

(1) "actuary" has the meaning assigned to it in clause (1) of section 2 of the Insurance Act, 1938;

.....

(121) ----

[PROVIDED that the provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.]"

8.3. We have referred to the above provisions only to indicate that pursuant to the Finance Act of 2012, Section 65 of the Act, i.e., the definition clause as it stood existed prior to 01.07.2012 was rendered inapplicable w.e.f. the said date viz., 01.07.2012. The Finance Act of 2012 brought out a paradigm shift in the scheme of the Service Tax Act viz., from levy of tax on enumerated services until 01.07.2012 to levy on all services other than those contained / enumerated in the negative list from 01.07.2012. A fresh set of provisions containing Definitions, Charging provision, Declared Services and Negative list of Services was introduced w.e.f. 01.07.2012 and the same are extracted below:

i Inserted by Finance Act, 2012 (23 of 2012), dt. 28-05-2012, w.e.f. 1-6-2012.



65B. Interpretations

In this chapter, unless the context otherwise requires,-

(1) “actionable claim” shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882;

.....

(44) “service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) an activity which constitutes merely,-

- (i) a transfer of the title in goods or immovable property, by way of sale, gift or in any other manner; or
- (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or
- (iii) a transaction in money or actionable claim;

66. Charge of Service Tax

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. of the value of taxable services referred to in sub-clauses

(a), (d), (e), (f), (g.) (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk), (zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zss), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg.) (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv), (zzzw), (zzzx), (zzzy), (zzzz), (zzzza), (zzzzb), (zzzzc) [(zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), [, (zzzzj), (zzzzk), (zzzzl) 4[(zzzzm), (zzzzn), (zzzzo), (zzzzp), (zzzzq), (zzzzr), (zzzzs), (zzzzt) [, (zzzzu), (zzzzv) and (zzzzw)]]] of clause (105) of section 65 and collected in such manner as may be prescribed:]

ⁱⁱ[PROVIDED that the provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.]

66B Charge of service tax on and after Finance Act, 2012

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of ⁱ[fourteen per cent] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

66D. Negative list of services

The negative list shall comprise of the following services, namely:-

ii Inserted by Finance Act, 2012 (23 of 2012), dt. 28-05-2012, w.e.f. 1-6-2012.

i Substituted for “twelve percent” by Finance Act, 2015 (20 of 2015), dt. 14-5-2015, w.e.f. 1-6-2015 vide Noti.No.14/2015-ST, dt.19-5-2015



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(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere-

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport:

(iii) transport of goods or passengers; or

(iv) [any service), other than services covered under clauses (i) to (iii) above, provided to business entities;

66E. Declared services

The following shall constitute declared services, namely:-

(a) renting of immovable property;

.....

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;"

9. On a perusal of the order impugned in the writ appeals, we find that the learned Judge has expressed that the Court will not embark upon disputed facts and will concern itself solely with the legal provisions involved. Importantly, the learned Judge also recorded that the Revenue's case was that the agreements are a sham designed to camouflage the true intent of the contracting parties rather a colourable device. In this regard, the following portions of the learned Judge are relevant:

"8.

According to the respondent, the use of the word 'perpetual' in the agreement is only a sham, designed to camouflage the true intent of the petitioner which is to enter into a temporary transaction. Thus, the transactions are vitiated as being colourable.

12. ... Of course, in determining the aforesaid, the Court will not embark upon an examination of disputed facts and will concern itself solely with the legal provisions involved, and their interpretation. Since the interpretation of the law cannot be undertaken in a vacuum, the facts admitted



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by all parties to the list shall form the backdrop for such application and analysis of the applicable legal provisions.”

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9.1. However, the learned Judge thereafter proceeded to make certain observations on merits, which causes serious prejudice to the Revenue as it imposes fetters on the power / authority of the Adjudicating authority in carrying out the adjudication pursuant to the order of remand. The question as to whether a particular transaction would attract the levy of Service Tax as constituting a taxable service within the meaning of 65(105)(zzzzt) prior to 01.07.2012 or Section 66B read with Section 65B(44) and Section 66E(c) w.e.f. 01.07.2012 ought to be determined on the basis of the contracts entered into between the service provider and the recipient. One cannot generalize the transactions nor determine the liability without examining the contracts individually for the rights/ obligations flowing therefrom may vary from contract to contract. This would be evident by the very fact that some of the contracts have been treated by the respondents in the writ appeals as representing temporary transfers thereby attracting the levy of Service Tax, while other contracts are understood by the respondents as resulting in perpetual transfers i.e., permanent and not temporary, thus outside the purview of levy of Service Tax. We are of the view that the observations so made by the learned Judge represent a truncated rather incomplete adjudication, warrant



interference.

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10. After submissions for a brief while, it was agreed upon by both the parties that the matters may be remitted back to the assessing authority for fresh adjudication as was in-fact done by the learned Judge, though after making observations on merits, with a request that all the issues may be left open.

11. In view of the above, in the case of challenge to show cause notice(s), the Respondents in the writ appeals / writ petitioners are permitted to file their objections and in the case of challenge to orders of adjudication, the same are set aside and liberty is granted to the Respondents / writ petitioners to file fresh / additional objections, if any, within a period of four weeks from the date of receipt of a copy of this judgment. Thereafter, the adjudicating authority shall proceed with the adjudication and pass orders in an objective and independent manner uninfluenced / unswayed / unfettered by any of the observations made by the learned Judge, within a period of four weeks from the date of receipt of the objections filed by the Respondents / writ petitioners as directed by this court.

12. Accordingly, all the writ appeals and the writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.



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[R.M.D., J.] [M.S.Q., J.]

04.01.2024

R.MAHADEVAN, J.

AND

MOHAMMED SHAFFIQ, J.

Spp/ mka

Speaking (or) Non Speaking Order

Index: Yes/No

Neutral Citation: Yes/No

To

The Principal Commissioner,
Office of the Principal Commissioner of CGST and Central Excise,
Chennai North Commissionerate,
No.26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

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