

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 01.04.2019	Orders Pronounced on : 16.04.2019
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CORAM:

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH
Writ Petition Nos.30085, 14425 & 29206 of 2018
5131 & 1199 of 2019 &
WMP Nos. 35098, 17040 & 34134 of 2018
& 5849 & 1351 of 2019

M/s. Vendhar Movies,
Represented by its Proprietor S.Madhan,
No.EA, Basement, Doshi Garden,
Vadapalani, Chennai - 600 026 ... Petitioner in
W.P.No.30085/2018

Super Good Films Private Limited,
Represented by its Managing Director
Mr. R.B.Choudary,
No.32 North Boag Road, T.Nagar,
Chennai 600 017 ... Petitioner in
W.P.No.14425/2018

Wunderbar Films Private Limited,
Represented by Mr.S.Vinod Kumar, Director,
No.13/6, 4th Floor, Jaganathan Road,
Chennai 600 034 ... Petitioner in
W.P.No.29206/2018
& Petitioner in
W.P.No.5131/2019

M/s. AGS Entertainment Private Limited,
Represented by its Director (M/55),
Flat No.B-2 First Floor,
Shoba Flats, No.12, 10th Avenue,
Ashok Nagar, Chennai - 600 083 ... Petitioner in
W.P.No.1199/2019

vs.

1. The Joint Director,
O/o. The Directorate General of GST Intelligence,
Chennai Zonal Unit, C-3 C-Wing, 2nd Floor,
Rajaji Bhavan, Besant Nagar, Chennai - 600 0902.

2. Additional Commissioner,
O/o. The Commissioner of GST & Central Excise,
Chennai South Commissionerate,
No.692 M.H.U. Complex, Nandanam,
Chennai 600 035

... Respondents in WP No.30085/2018

3. Principal Additional Director General,
Directorate General of GST Intelligence,
Chennai Zonal Unit, C-3 C-Wing, II Floor,
Rajaji Bhavan, Besant Nagar,
Chennai 600 090

... R-1 in WP
No.14425/2018

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

... R-2 in WP
No.14425/2018
& sole respondent in
WP Nos.29206/2018
& 5131/2019

5. The Commissioner of GST & Central Excise,
Chennai South,
M.H.U. Complex No.692, 5th Floor,
Anna Salai, Nandanam,
Chennai 600 035

... Respondent in WP No.1199/2019

Prayer in W.P.No.30085/2018:- Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records in the proceedings in the impugned Show Cause Notice No.100/2018, dated 17.09.2018, issued by the first respondent, in F.No.INV/DGCEI/CHZU/ST/15/2016 and to quash the same as arbitrary and illegal.

Prayer in W.P.No.14425/2018:- Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records in the proceedings in Order in Original No.27/2018 CH.N.GST dated 05.03.2018 passed by the second respondent and to quash the same as arbitrary and illegal.

Prayer in W.P.No.29206/2018:- Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records in the proceedings in C.No.V/15/67/2017-Ch.Nadj in Order in Original No.84/2018 CH N GST (Commr.) dated 09.07.2018 passed by the respondent and to quash the same as arbitrary and illegal.

Prayer in W.P.No.5131/2019:- Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records in the proceedings in C.No.V/15/50/2018-Ch.Nadj in Order in Original No.121/2018 CH N GST (Commr.) dated 17.12.2018 passed by the respondent and to quash the same as arbitrary and illegal.

Prayer in W.P.No.1199/2019:- Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records of the respondent in the impugned Order-In-Original Nos.29 & 30/2018, dated 20.08.2018, quash the same as the same seeks to levy service tax on permanent transfer of copyright and is against the decision of this Court in petitioner's own case AGS Entertainment Ltd. V. Union of India in W.P.No.29398/2010, dated 26.06.2013 wherein it has been held that permanent transfer of copyright is not taxable.

For Petitioner in WP Nos. 30085,
14425 & 29206 of 2018 & 5131 of 2019 : Mr. Joseph
PrabhakarFor
Petitioner in WP No.1199/2019 : Mr. AR.L.Sundaresan,
Sr. Counsel, for,
Ms. Radhika Chandrasekhar.
For R-1 in W.P.No.30085/2018 &
For Respondents in WP No.14425/2018
& For Respondent in WP No.29206/2018:
and Sole Respondent in WP.1199/19
Mr. V.Sundareswaran,
Senior Panel Counsel.
For R-2 in W.P.No.30085/2018 : Mr. G.Syed Noorullah,
Standing Counsel
For Respondent in WP No.5131/2019: Ms.Seetha Lakshmi,
Standing Counsel.

C O M M O N O R D E R

These five writ petitions challenge a show cause notice/orders-in-original issued by the Service Tax Department to producers/purchasers of cinematograph films who have assigned some part of their copyright in the cinematograph films to television channels, invoking the provisions of the Finance Act, 1994 (in short 'Act'), relating to 'Intellectual Property Right' service.

2. Heard the detailed submissions of Mr.Joseph Prabakar, for Vendhar Movies, (WP Nos. 30085 of 2018), Super Good Films Private Limited (W.P.No.14425 of 2018) and Wunderbar Films Private Limited (W.P.No.29206 of 2018 &

W.P.No.5131 of 2019), Mr.AR.L.Sundaresan, learned Senior Counsel, for Ms.Radhika Chandrasekhar, learned counsel for AGS Entertainment Private Limited (W.P.No.1199 of 2019), Mr.V.Sundareswaran, learned Senior Panel Counsel, Mr.Noorullah learned Standing Counsel and Ms.Seetha Lakshmi, learned Standing Counsel, for the respondents. The writ petitions, annexures and the case laws cited at the Bar have been studied and considered in detail.

3. I must, at the outset, make it clear that the veracity or otherwise of the impugned show cause notice and orders-in-original are taken up for examination, solely since they appear to adopt a stand not in consonance with the relevant provisions of law, both those in the Act as well as in the Copyright Act, 1957 (in short 'CR Act'). This Court has not concerned itself with any factual particulars, except for the limited purpose of appreciating and adjudicating upon the legality of the impugned notice and orders. It is solely on the aforesaid basis that I proceed to advert to the rival contentions advanced by both parties.

4. 'Taxable Services' under service tax law include services provided to any person by a holder of 'intellectual property rights' (in short 'IPR'). The journey of taxation of IPR services commenced on 10.09.2004 with the introduction of Section 65(55b) when the transfer of an IPR, either permanent or otherwise, or the permitting of the use or enjoyment of an IPR was brought under the ambit of levy of service tax for the period till 15.05.2005. Thereafter, for the period 16.05.2005 to 30.06.2012, Section 65(55b) brought to tax income from the service of temporary transfer or permitting the use or enjoyment of IPR.

5. After the introduction of the negative list with effect from 01.07.2012, IPR service was a declared service in terms of Section 66E(c). Taxable services were defined in terms of section 65(105) and clause (zzzzt) thereof reading as follows:

'65(105) (zzzzt): "Taxable service' means any service provided or to be provided 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, except the rights covered under sub-clause (a) of clause (1) of section 13 of the said Act.'

6. Section 13 of the CR Act enumerates the following classes of work as those in which copyrights subsist: (a) Original literary, dramatic, musical and artistic work; (b) Recording of cinematograph films; (c) Sound recordings. The works referred to in (a) have been kept outside of the tax net and only those works referred to in (b) and (c) have been made taxable under service tax law.

7. The petitioners are engaged in the production of cinematograph films. In the regular course of business, the petitioners enter into various agreements with distributors, exhibitors and television channels assigning to them exclusive rights for broadcast and exhibition of various cinematograph films, both produced as well as purchased by them. The rights include satellite television broadcast, direct to home broadcast, direct satellite service, terrestrial television broadcast and all other rights connected therewith including exhibition of the film by means of wireless diffusion and by wire for communication to the public through television broadcast.

8. The salient features of the arrangements entered into by the petitioners with distributors/exhibitors are common across the writ petitions and broadly set out below. The narration to follow also takes into account the admitted facts, the relevant features of the assignment agreements and the submissions on merits advanced by both parties:

- All petitioners are companies engaged in the production and distribution of cinematographic films/feature films/movies.
- Agreements were entered into for distribution of cinematograph films produced by the petitioners, visual recording of cinematograph film, accompanying sound track and all other features of the film which constitute an asset/assets in which copyright subsists.
- Assignment agreements are also entered into in respect of films purchased by the petitioners for theatrical distribution.
- As film producers, the entire copyright(s) comprised in the cinematograph film belongs to them and they are entitled to transfer such copyright to distributors for theatrical exploitation in respect of a demarcated area.
- The Cinematograph film is also capable of being exploited in respect of terrestrial television broadcast right and satellite television broadcast right, exhibition by wireless distribution and by wire, satellite channels for broadcast, DVD rights, remake rights, Dubbing rights, Oversees rights and Audio rights.
- Thus, the petitioners are the owners of a bundle of rights that flow from the ownership of the cinematograph film as a conglomerate asset. This conglomerate asset has a copyright by itself and as a whole, and also contains within itself several assets with concurrently existing copyrights.
- No sales tax, either State or Central, has been paid

on the assignment/transfer of the copy rights.

- The assignment of the rights are perpetual in nature, conferred permanently and absolutely and without any restriction or limitation whatsoever, upon the assignee.
- The petitioners have also assigned copyrights that are temporary in nature and in respect of which service tax liability has been borne.
- Thus, the petitioners recognize a clear difference and demarcation between those agreements for temporary transfer of copyright and those where the transfer is perpetual and permanent and it is only the latter in respect of which the petitioner claims exclusion from the levy of service tax. The burden of tax on the former category has been discharged in full.
- Some of the assignment agreements state that the same are 'revocable'. This, by itself, does not militate against the assignments being permanent, since the revocability of the agreement is only in cases where the consideration for the assignment was to be paid in instalments and conditional upon there being a default committed by the assignee in effecting such payment. Subject to the satisfaction of the aforesaid condition, the transfer/assignment of the copyright is irrevocable.
- Thus it is only to protect against a default in payment by the assignee that the petitioners had provided for revocability of the agreement, as, in the alternative, the transfer of copy right would have been completed without the petitioners having received the full consideration in respect thereof.
- Several provisions of the CR Act are referred to in extenso by learned counsels for the petitioners in support of their submissions as above and I will detail them in the paragraphs to follow.
- In some cases the petitioners have raised the plea of limitation. According to them, the issue in question was well within the knowledge of the service tax department from as early as in 2010 when one of the petitioners in this batch, AGS Entertainment Private Limited, along with several other similarly placed assesses, had approached this Court challenging the vires of the provisions of Section 65(105)(zzzzt). After completion of pleadings, a Division Bench of this Court had upheld the validity of the provision vide order dated 26.06.2013. Thus the department was well aware of the business activities of the petitioners', specifically the issue concerning

transfer of copyrights, both temporary as well as permanent, that arise in these cases. However, show cause notices ('SCN') were issued belatedly for periods prior to five (5) from date of issuance of the notice, invoking the period of extended limitation.

- In the case of AGS Entertainment, the SCN was issued on 17.01.2017 for the period 01.07.2010 to 30.06.2012 under the category 'copyright services' in terms of Sections 65(105)(zzzt) and 66E(c) for the period 01.04.2013 to 31.03.2015 invoking the extended period of limitation permitted under the proviso to Section 73(i) of Finance Act 1994. Thereafter, a statement of demand was issued for the subsequent period, April 2015 to June 2017 along similar lines as the previous notices.
- Extended period of limitation is liable to be invoked only in cases where the Department is able to establish the existence of fraud, collusion or suppression on the part of the petitioner/assessee in disclosing taxable income. This however, cannot be so, in a case where the activities of the petitioner were more than transparent and were in fact the subject of writ petitions that were pending since 2010 and that the Department was actively contesting from the word 'go'. Thus the impugned orders are also barred by limitation. Reliance is placed upon the following decisions:
 - (i) Collector of Central Excise vs. Chemphar Drugs & Liniments Ltd (2002) TIOL 266
 - (ii) Continental Foundation Joint Venture Vs. CCE (2007) 216 ELT 177
- The decision of the Division Bench upholding the constitutionality of the provision is under challenge before the Supreme Court.
- On merits, the impugned orders proceed on the basis that the petitioners assign only specific copyrights while retaining other copyrights in the same cinematograph film with themselves. According to Mr. Sundareswaran, this renders the transfers 'temporary' in nature.
- Moreover the assignment, in all cases, is perpetual and in many cases, is for 99 years. Since the provisions of the Act provides for a period of 60 years as being the life of a copyright, the transactions in question do not constitute permanent transfers.
- The respondent also states that the transactions are not in tandem with the provisions of Section 21 of the

Act.

- 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.
- The Assessing Authority relies substantially upon the decision of the Division Bench in the case of AGS Entertainment Private Limited v. Union of India (2013) (32) STR 129 (Mad.).
- According to him, the perpetual transfer as per agreement is not an 'absolute transfer for the reason that the transfer of legal right to copyright has to be to the exclusion of all person including the transferor and during the period of such transfer, the transferor cannot again transfer the same rights to others. AGS make commercial exploitation of copyright in many ways including theatre rights, satellite and television rights, DVD rights dubbing and remake rights, etc. Further, these rights are granted to various people simultaneously for exploitation in different regions. Entire copyright should be transferred to the other person to constitute permanent transfer or perpetual transfer which is not so in the case of AGS'. Therefore, in order to constitute a perpetual transfer, the entire rights in relation to the film would have to be transferred by the producer. According to the respondents, the issue has been dealt with by the Division Bench in detail, in the case of AGS Entertainment (supra), which settles the matter and thus, the contentions of the petitioners would have to be rejected.
- For the aforesaid reasons, on merits, the transactions should, according to the Department, be held to be liable to tax.
- Mr.V.Sundareswarn, learned Senior Panel Counsel, for the Department, in all fairness, does not dispute the position that all agreements for transfer/assignments are 'in perpetuity' and specifically states so, which I record.

9. It is on the basis of the above admitted factual matrix that I proceed to dispose the writ petitions. I make it clear that this decision would not be applicable should there be any differences on facts in other similar matters.

10. Before advertng to the merits, I must deal with the issue of maintainability of the present writ petitions raised by Mr.Sundareshwaran. His argument is two pronged: (i) that the issue at hand has been heard and decided against the assessee by a Division Bench of this Court in the case of AGS

Entertainment Ltd. V. Union of India in W.P.No.29398/2010, dated 26.06.2013; (ii) that the stage at which the petitioners have approached this Court is very premature in so far as only a show cause notice and orders of assessment have been issued/passed and that the petitioners may be directed to file a reply or pursue the matter through statutory hierarchy by way of appeal.

11. Reliance in this regard is placed on the following decisions:-

(i) 2011 (269) ELT 9 (Mad.) (United Bleachers Ltd. V. CEGAT, Chennai)

(ii) 2015 (37) STR 679 (Mad.) (T.T.Krishnamachari & Co. v. Union of India)

(iii) Commissioner of Customs v. M/s.Sri Vasavi Gold & Bullion Pvt. Ltd., CMA No.813/2016, dated 08.08.2017 (DB) (Madras High Court)

(iv) 2014 (35) STR 68 (Royal Bank of Scotland N.V. v. Commissioner of Customs and Central Excise, Noida) (DB) (Allahabad)

(v) 2017 (7) GSTL 202 (Commissioner of Service Tax v. DLF Golf Resorts Ltd.) (DB) (P&H)

(vi) M/s. JSK Film Corporation, Rep. by its Sole Proprietor, J.Sathish Kumar v. The Additional Commissioner of Service Tax and two others (W.P.Nos.28384 & 28385 of 2017) dated 07.11.2017 (DB) (Madras High Court).

12. I have heard all learned counsel exhaustively on the question of maintainability. As far as the question of maintainability and alternative remedy is concerned, it is all too well settled that where a legal infirmity is pointed out and established, there is no fetter on this Court to consider the validity or otherwise of such order of assessment of even a show cause notice. The golden rule of guidance is that, as a rule, the court will exercise extreme restraint in interfering in such matters, except where the petitioner satisfies the Court that one or more of the following exceptions exist in the case in question, bearing in mind that the flaw alleged should go to the root of the matter and should be purely legal in nature. Instances of such illegality may be culled from several judgements of the Supreme Court to be (a) a challenge to the constitutionality or vires of a statutory provision (b) a bar of limitation (c) assumption of jurisdiction by the officer where none exists (iii) patent and apparent illegality in the framing of the order, in contravention of the statutory provisions in play. 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 by all parties to the lis shall form the backdrop for such application and

analysis of the applicable legal provisions.

13. It is indeed correct that a Division Bench of this Court in the case of AGS Entertainment Private Limited (supra) considered a challenge to the provisions of Sections 65(105) (zzzzt) of the Finance Act, 1994 bringing within the ambit of service tax income generated from 'temporary transfer or permitting the use or enjoyment of any copyright' as defined under the CR Act. At paragraph 59, the Division Bench frames the issue before it in the following manner:-

'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.'

14. The decision exhaustively examines the transactions between the producers and the distributors and in conclusion upholds the vires of Section 65 (105) (zzzzt) of the Act. This is what the Bench states at paragraph 110:-

'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.'

15. The issue before me is not a challenge to the statutory provisions, but an alleged, gross misinterpretation of the same. The petitioners are certainly bound by the provisions, as they exist, particularly seeing as their constitutionality has been upheld. However, the case of the petitioners' is that the provisions have been erroneously interpreted and applied to the business transactions in their case. The applicable provisions in question straddle two statutes - the Finance Act 1994 levying Service tax and The Copyright Act 1957. The interpretation and interplay adopted by the Revenue is wholly contrary to the basic scheme of the statutes, particularly the CR Act, and if such interpretation is left untouched, the purport and scheme of both statutes would stand distorted. It is on the aforesaid premise that the writ petitions have been filed. Whether the petitioners' are correct in their averments and allegations against the Revenue is a different matter. However, one thing is clear. The lis before the Division Bench is entirely different from the lis projected before me. For the aforesaid reasons, I do not believe that the conclusion of the Division Bench in the case of AGS Entertainments impinges on the maintainability of the present writ petitions.

16. As far as the other decisions relied upon by the Revenue are concerned, they are all distinguishable in law in so far as they relate to Writ Petitions filed challenging orders of the Customs, Excise and Service tax Appellate Tribunal (CESTAT) (United Bleachers, Royal Bank of Scotland and DLF Gold Resort (supra)), and an Appeal filed in terms of section 130 of the Customs Act, Sri Vasavi Gold & Bullion Pvt. Ltd (supra), all turning on the question as to whether the lis would lie before the Supreme Court or the High Court for resolution. This is not the dispute before me. In the decision in the case of T.T.Krishnamachari, the court was reluctant to interfere for the reason that the matter involved disputed facts. The decision in the case of JSK Film Corporation does not appear germane to the case in point. In fine, none of the decisions relied upon advance the case of the Revenue. The writ petitions are thus maintainable and I hold so.

17. I now advert to the merits of the arguments of the parties. The conclusions of the assessing authorities are best expressed in their own words and the offending portion of the impugned show cause notice and two orders of assessment, the rationale of which would extend in common to all petitioners, are extracted below:-

Extract from Show Cause Notice dated 17.09.2018 in
W.P.30085 of 2018:

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10. Summary

In view of the foregoing it appears
that,

- Vendhar Movies is a cinema production company engaged in producing films and engaged in purchase, market and distribution of films;
- It was started in August 2012 with two partners viz Shri Madhan and Shri Balagurunathan and later during November 2015, Shri Balagurunathan had withdrawn from the partnership and Shri Madhan became the sole proprietor of Vendhar Movies;
- They are the absolute copyright holder engaged in transfer of Copyrights for the films produced by them in respect of satellite rights, audio rights, FMS rights, etc. and also temporarily transferred or permitted the use/enjoyment of copyrights of the film for various satellite channels;
- Vendhar Movies have produced two films, viz Thillu Mullu 2 and Payum Puli during the period June 13 and Sep 15 respectively; during the production of the film, Thillu Mullu 2, an Under production agreement was entered into by Vendhar Movies with M/s Vijay Television Private Limited for transfer of satellite rights of the film and they earned consideration on the same;
- Vendhar Movies have temporarily assigned and permitted the use and enjoyment of the copyright to M/s Vijay Television Network Ltd., the Satellite rights of the Tamil feature film "Thillu Mullu 2" produced by the for a perpetual period for a consideration of Rs 2,99,00,000/-;
- For the movies "Paayum Puli: and "Lal Bahadur Shastri", Vendhar Movies have entered into an agreement with M/s Sun TV Network Limited and have temporarily assigned and permitted the use and enjoyment of the copyright of the movie

produced by them for a perpetual period for a consideration of Rs.3,00,00,000/- and Rs.2,25,00,000/- respectively;

- From the assignment agreement entered with M/s Sun TV, it appears that the assignment of copyright for the broadcast of the films will be restricted only to the rights specified in clause 4 the agreement and M/s Vendhar Movies have clearly retained their ownership with respect to other rights other than those assigned to the assignees as discussed in para 3 of this notice; that the consideration received by M/s Vendhar Movies covered under the taxable services- Copyright Service for the period from 1.4.2014;
- Though the intention of Vendhar Movies was to assign temporary transfer, the terms 'perpetual' has been mentioned only to claim exemption from payment of service tax; that further, from what was discussed in above paras, it appears that, the temporary transfer of satellite rights is also classifiable and liable to service tax under the category of taxable services. However, Vendhar Movies have not paid the service tax on the consideration received by them in connection with temporary transfer of copyrights.
- Vendhar Movies had not obtained service registration for providing such taxable service at the material time and had not assessed the service tax payable on such taxable services rendered by them and had not paid the same to the exchequer at the material time....

Extract from Order-in-Original dated 09.07.2018 in W.P.29206 of 2018:

5.4. From the above provisions of the Acts and from various clauses of the agreement it is clear that the activities of the assessee falls under the Copyright service. However in order to know the taxability of the service the nature of such transfer has to be decided. In Copyrights

of Cinematographic films, the producer of the film make commercial exploitation of these rights in many ways including but not limited to theatre rights (both distribution & exhibition), Satellite & Television rights, DVD rights, dubbing and remake rights. Further, these rights will be granted to various people simultaneously for exploitation in different regions, each active in one or more regions and need to be licensed those separately. A transaction constitutes 'permanent transfer of copyright' only in a case where entire copyright (all modes of commercial exploitation) is transferred or leased to the exclusion of all persons including owner of such copyright. On perusal of the agreements, it is seen that, the entire bundle of rights is not transferred as the copyright is capable of being exploited by different entities for earning revenue. In these agreements, M/s.WFPL have transferred enjoyment of the different copyrights as mentioned above to different parties, for the same time period for exploitation in different regions or different media. The agreement whose nature of transfer is in question does not bestow rights outside the area of assignment. On perusal of various clauses in the agreements it is seen that the producer or the absolute owner assign specific rights for a specific territory, that the agreement does not bestow rights outside the area of assignment and the distributor only gets positive prints or digital copies of the film for exhibition of the film in a specified area. From the above clauses of the assignment agreement it is clear that it is only a temporary transfer of copyright or permission to broadcast the film in a specified territory for a specified period of time.

5.5. Further these transactions cannot be called as absolute sale as in the case of sale the buyer will acquire all the rights of the seller which will enable him to exploit such acquired rights for unrestricted exploitation and the seller would cease to have any rights which is not the case in the transactions discussed

above. In the case of first copy sale, all forms of rights in respect of the films in question, are transferred to the Buyer, to the exclusion of the seller / producer. This is clearly not the case in the impugned agreements as Wunderbar do not cease to hold rights on the films. While the producer retains his right to exploit that film, there is no transfer of right to use the goods amounting to sale within the meaning of Article 366(29A). On the other hand, it is a temporary transfer of copyright or permitting its use or enjoyment by the lessee. As long as the producer does not fully relinquish his right over the copyright held by him, transfer of right to use is purely temporary and levy of service tax for such transfer of copyright would apply.'

Extract from Order-in-Original dated 20.08.2018 in W.P.1199 of 2019:

.....

79. Exclusion of permanent transfer of copyrights:-

It is pertinent to note that permanent transfer of rights is excluded from service tax. At the time of levy of service tax on taxable service of Intellectual Property Rights (IPRs) as defined in Section 65(105) (zzr) of the act, the Department clarified as follows:

"A permanent transfer of intellectual property right does not amount to rendering of service. On such transfer, the person selling these rights no longer remains a 'holder of intellectual property rights' so as to come under the purview of taxable service. Thus, there would not be any service tax on permanent transfer of IPRs." (Circular No.80/10/2004-S.T., dated 17-9-2004 para 9.2).

The same proposition applies to copyright which is another form of intellectual property right. Thus, permanent transfer of copyright will not amount to rendering of service and therefore, will be excluded from the purview of service tax."

23.0. In fact the defence of AGS is also on these lines. It has been argued that

the assignment of copyright is on permanent basis and since it is not a temporary transfer, no service tax is payable.

23.1. I proceed to examine the contention below. I find that it is relevant to examine whether the transfer is 'permanent' or 'temporary' not on the basis of the agreements churned out by the parties but by the copyright Act as such agreements will have to stand the test of law. Here I find that the copyright Act prescribes a specific method by which copyright can be renounced by the owner. As per section 21 of the Copy Right Act, 1957.

"21. Right of author to relinquish copyright.-

(1) The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights and thereupon such rights shall, subject to the provisions of sub-section (3), cease to exist from the date of the notice.

(2) On receipt of a notice under sub-section (1), the Registrar of Copyrights shall cause it to be published in the Official Gazette and in such other manner as he may deem fit.

(3) The relinquishment of all or any of the rights comprised in the copyright in a work shall not affect any rights subsisting in favour of any person on the date of the notice referred to in sub-section."

23.2. Further Rule 5 of Copyright Rules, 1958, which deals with relinquishment of Copy right read as follows:

"Notice of relinquishment.- The author of a work desiring to relinquish under section 21 all or any of the rights comprised in the copyright in the work shall give notice to the Registrar of Copyright in accordance with Form."

23.3. I find that no relinquishment as contemplated in the Section 21 of the Copyright Act, 1957 or Rule 5 of Copyright Rules, 1958 was performed by AGS. In the absence of relinquishing the right as contemplated in the copyright Act the ownership of the right does not shift to the

assignee but reverts back to the assignor after the said period in the agreement. Therefore I hold that such copyright is only 'temporary' and cannot be called permanent in view of the copyright act and without relinquishing the assignor has temporarily permitted the use of enjoyment of copyright and such an assignment thereafter cannot be considered permanent by any sort of reasoning whatsoever. Secondly, I find that the argument of the assessee that the transfer can only be 'permanent' as it is for 99 years whereas Copyright Act itself is fighting piracy, these arguments are merely theoretical and no meaningful conclusion that the transfer is 'permanent' can be drawn because the assignment agreement provided for much more no. of years than protected by copyright.

23.4. In the agreements also nowhere it has been stated that by way of assignment the owner relinquished their copyright in favour of the assignee. AGS, it appears, feel that he can simply evade service tax merely by putting assignment for 'perpetuity' under the misguided notation that such an agreement should be a 'sale' and not 'lease' as applied to goods/property. I therefore find that there is merit in the argument given by DGCEI that AGS has simply stated that the transfer is permanent without intending to do so in as much as he continues to be the owner of the intellectual property/copyright. I find that what is applicable to 'goods' cannot be blindly applied to intellectual property and any assignment agreement of such an intellectual property for 'perpetuity' to blindfold it to be a sale of goods only proves AG's intention to evade. Therefore even by way of assignment for 'perpetuity' also the title does not get transferred to the assignee as can be seen from the agreements of assignment. In the absence of explicit statement relinquishing copyright which amounts to equivalent of conferring 'title' to the assignee in the agreements, the transfer effected by way of assignment is only a temporary transfer. Since there is no transfer of title, the assignor/AGS has

allowed enjoyment of certain rights to the assignee. This enjoyment is in the form of overseas rights, satellite rights, dubbing rights, etc, is without any permanent transfer. The assignee has no right to modify, alter etc, which are the rights that would arise when the title is transferred to the assignee.

24. From the above discussion I find it is the duty of the service provider to properly classify their service, get themselves registered for the taxable services provided by them, file ST-3 returns and to determine and pay their correct tax liability, which they failed. Had the officers of DGCEI not conducted the detailed inquiry, the said rendering of taxable services by AGS would have escaped assessment and resulted in non payment of service tax. They were aware of the facts regarding payment of service tax on the above services rendered by them and disguised such temporary transfer of copy right as transfer for perpetual period to claim the same as permanent transfer of copy right. The suppression with intent to evade payment, on part of AGS is proved beyond doubt and proviso to Section 73(1) of the Finance Act, 1994 has been rightly invoked in the instant case and the demand of service tax for the period 2010-11 (July 2010 to March 2011) to 2014-15 is justified.

28.2. In the instant case, as suppression of the material facts have been established beyond doubt as discussed above, I consider this as a fit case for imposing penalty under Section 78 of the Finance Act, 1994. AGS's intention to evade is established beyond doubt in as much as he entered into assignment agreements incorporating clauses like 'permanent transfer/perpetual transfer/assigned for perpetuity etc., which are applicable to 'goods' and not 'intellectual property' like copyright and thereby misleading the dept that no service is provided by them. But for the detailed investigation done, this evasion could not have been unearthed and AGS make themselves liable for mandatory

penalty. This gets compounded by the fact that there is a High court Judgment in department's favour in which AGS is also a party. Therefore AGS cannot also claim that the matter involves interpretation of law and therefore penalty is not applicable. Even after the same, AGS deserves to be penalized under section 78 of the Finance Act, 1994. Further AGS is also liable to penalty under Section 77 of Finance Act, 1994 as they failed to take registration and comply with other provisions of the services tax law.

18. Taxability of IPR and copyright service has to be strictly within the contours and prescription of section 65 (105)(zzzzt) of the Act read in tandem with the relevant provisions of the CR Act. The purpose of the charging provision under the Act is only to bring to tax income from those services that constitute a 'temporary transfer' of IPR. The provision thus addresses, apparently, an intangible right. To that extent, the observation of the respondent in the order-in-original in the case of AGS Entertainment extracted above (paras 23.3 & 23.4), to the effect that the phrases 'permanent transfer/perpetual transfer/assigned for perpetuity etc.', are only applicable to 'goods' and not 'intellectual property' like copyright is clearly contrary to the very statutory provision in terms of which the assessment is sought to be made. This is a perverse observation that runs counter to the statutory provisions involved.

19. The petitioners have admittedly transferred independent rights relating to the exhibition of Cinematograph films to the Television Channels. According to the Assessing Authority, it is only if the film was transferred, in entirety, that the transfer would amount to a 'perpetual' transfer and nothing short thereof. The transfer of any part of the copyright relating to a specific aspect of the cinematographic film would only be temporary in nature. This, in essence, is the argument of the respondent.

20. In order to appreciate the controversy raised by the Service tax Department, it is necessary to advert to some of the provisions of the CR Act and understand the scheme of the statute, its purport and the interplay with the provisions of the Act.

21. The provisions of Section 13 of the CR Act detail the works in which copyright subsists and states that subject to the provisions of this Section and other provisions of the CR Act, copyright shall subsist throughout India in: a) original literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) sound recording. 'Copyright' is

defined in Section 14 as follows:-

'14. Meaning of Copyright.- For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-

(a) in the case of a literary, dramatic or musical work, not being a computer programme,-

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public; (iv) to make any cinematograph film or sound recording in respect of the work; (v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,-

(i) to do any of the acts specified in clause (a);

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work,-

(i) to reproduce the work in any material form including-

(A) the storing of it in any medium by electronic or other means; or

(B) depiction in three-dimensions of a two-dimensional work; or

(C) depiction in two-dimensions of a three-dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);
(d) in the case of a cinematograph film,—
(i) to make a copy of the film, including—
 (A) a photograph of any image forming part thereof; or
 (B) storing of it in any medium by electronic or other means;
(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film;
(iii) to communicate the film to the public;
(e) in the case of a sound recording,—
(i) to make any other sound recording embodying it including storing of it in any medium by electronic or other means;
(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;
(iii) to communicate the sound recording to the public.'

22. In the present case, there is no dispute with the position that the petitioners are producers or purchasers, and thus, owners of the copyright in cinematograph films.

23. The Proviso to Section 17 of the CR Act recognizes the independent copyright of first owners of individual works incorporated in a film and reads thus:-

'....Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.'

24. Sections 18 of the CR Act deals with assignment of copyright in the following terms:

18. Assignment of copyright.— (1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof:

.....
(2) Where the assignee of a copyright becomes entitled to any right comprised in the

copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

25. Sub-Section (2) recognizes the separate and concurrent rights of an assignor & assignee in respect of the assets and underlying rights, assigned or retained, as the case may be. Section 19 stipulates the mode of assignment stating that 'no assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.'

26. The provisions of Section 56 of CR Act also makes it clear that an asset comprises of several components, each holding an independent copyright in its own right. The Section states thus:-

'56. Protection of separate rights.- Subject to the provisions of this Act, where the several rights comprising the copyright in any work are owned by different persons, the owner of any such right shall, to the extent of that right, be entitled to the remedies provided by this Act and may individually enforce such right by means of any suit, action or other proceeding without making the owner of any other right a party to such suit, action or proceeding....'

27. A conjoint reading of the provisions of Sections 13, 14, 17, 18, 19 and 56 make it clear that the term 'copyright' denotes a specific and special right bestowed by statute. It may relate to one of several kinds of creative inputs, the sum total of which/portions of which, may constitute different assets, each holding a different underlying copyright.

28. A cinematograph film, the asset that we are concerned with in the present batch of cases, is perhaps one of the best illustrations of this concept. The cinematograph film holds a copyright in its own right, as a whole. However, the film, as an asset, comprises of various smaller but equally important components, such as the script, screenplay, background score, song lyrics, melody, instrumentation,

orchestration, the use of light and camera work, to name a few. While the sum total of these inputs results in a film, the copyright of which will be held by the producer, each component thereof carries an independent and distinct copyright. This has given rise to the expression, 'bundle of rights', as per which the film holds a copyright by itself and also comprises of small, but equally distinct rights within itself. It is the lack of appreciation of the aforesaid point that, in my view, is the fundamental and fatal flaw in the impugned show cause notice and orders of assessment.

29. I can do no better than to quote from the judgement of the Supreme Court in the case of Indian Performing Right Society Ltd. Vs. Eastern Indian Motion Pictures Association and Others [PTC (Suppl) (1) 877 (SC)], where Justice V.R.Krishna Iyer, in conclusion and to supplement the majority judgment, states thus:

22. A cinematograph is a felicitous blend, a beautiful totality, a constellation of stars, if I may use these lovely imageries to drive home my point, slurring over the rule against mixed metaphor. Cinema is more than long strips of celluloid, more than miracles in photography, more than song, dance and dialogue and indeed, more than dramatic story, exciting plot, gripping situations and marvellous acting. But it is that ensemble which is the finished product of orchestrated performance by each of the several participants, although the components may, sometimes, in themselves be elegant entities. Copyright in a cinema film exists in law, but Section 13(4) of the Act preserves the separate survival, in its individuality, of a copyright enjoyed by any 'work' notwithstanding its confluence in the film. This persistence of the aesthetic 'personality' of the intellectual property cannot cut down the copyright of the film qua film. The latter right is, as explained earlier in my learned brother's judgment, set out indubitably in Section 14(1)(c)...

30. It is thus, too well settled, that an asset, such as a cinematograph film, comprises of a bundle of rights. Setting this principle against the context and purpose of Section 65(105)(zzzzt), the 'right' mentioned therein, relates to the right in the film as well as each of such rights comprised in the film. The interpretation accorded by the Department tends to ignore the fact that the taxable service under Service Tax Law is of 'any copyright' denoting

all rights, that which vests in film as a whole, or any of the smaller but equally important rights comprised in the making of the film itself. The impugned notice and orders-in-original, to the extent to which they do not indicate appreciation as well as application of the aforesaid, are erroneous in law and are liable to be quashed.

31. The respondent relies on the provisions of Section 21 of CR Act, extracted below:-

"21. Right of author to relinquish copyright. - (1) The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to [the Registrar of Copyrights or by way of public notice] and thereupon such rights shall, subject to the provisions of sub-section (3), cease to exist from the date of the notice.

(2) On receipt of a notice under sub-section (1), the Registrar of Copyrights shall cause it to be published in the Official Gazette and in such other manner as he may deem fit.

[(2-A) The Registrar of Copyrights shall, within fourteen days from the publication of the notice in the Official Gazette, post the notice on the official website of the Copyright Office so as to remain in the public domain for a period of not less than three years.]

(3) The relinquishment of all or any of the rights comprised in the copyright in a work shall not affect any rights subsisting in favour of any person on the date of the notice referred to in sub-section (1)."

32. The respondent appears to have entirely missed the ambit and scope of Section 21 extracted above. Section 21 deals with the 'relinquishment' or the 'giving up' of a right and not the 'assignment' thereof. The two are different concepts. The assignment of a copyright is by way of transfer, dealt with under section 18 and 19 of the CR Act. On the other hand, sub-section (1) of Section 21 entitles the author to 'relinquish' the whole or any part of the rights comprised in the work. This cannot be equated with a 'transfer' of a copyright which is what is dealt with under the Act for the purposes of levy of Service tax. Reference to Section 21 by the respondents is wholly misconceived as it hardly comes to their aid. Rather, it supports the case of the petitioners as, incidentally, Section 21 itself provides for the entitlement of an author to relinquish his copyright

specifically using the phrase 'all or any of the rights comprised in the copy rights in the work'. This supports the conclusion that a work may either comprise of a 'single right' or a 'bundle of rights', some that may be relinquished and others that are pursued and will survive.

33. The petitioners before me all confirm that the documentation entered into by them with Television Channels specifically uses the word 'perpetual' and this is specifically and fairly admitted by Mr.Sundareshwaran. Apparently, in such a case, the transaction clearly stands outside the ambit of service tax. The stand of the Department is that the use of the word 'perpetual' is a mere camouflage. The Assessing Authority proceeds on the basis that the use of the words 'in perpetuity' are not in consonance with the spirit of the agreement and is only used to disguise the actual fact that the transfer was temporary and to avoid tax. However, this is only a suspicion and nothing is brought on record to prove the allegation.

34. As regards the use of the word 'revocable' in some agreements, the argument of the petitioners that the revocability is solely restricted to those situations where the consideration for the right has not been remitted in full by the purchaser, appears, prima facie, reasonable and acceptable. It is, of course, for the assessing officer to determine any aberrations or deviations, in fact, to the aforesaid submission in the course of assessment proceedings and consequently, either accept or reject the stand of the assessee on a case to case basis.

35. An assessment under service tax law is to be based on material available on record and cannot base itself only upon suspicion. No doubt, the Department is empowered to pierce the veil and disprove the averments of an assessee, and to this effect, call upon the assessee to produce all material that the Department or assessee itself believes are necessary to establish its case. It is also entitled to go behind the apparent and assess a transaction as it really is, rather than what the contract/agreement portrays it to be. Though the initial burden is upon an assessee to establish the proper nature of a transaction and the stand taken by it in law and on facts, once it has done so, such burden then shift upon the department to disprove the picture painted by the assessee and establish the falsity of the agreement as well as the true nature of transaction entered into between the parties. This burden is not discharged in the present cases and the officers merely allege falsity without, in any manner, being able to disturb the transaction as portrayed by the petitioners.

36. This Court, in the case of Mrs.K.Bagyalakshmi v. Deputy Commissioner of Income Tax, Media Circle-I, Chennai (265 CTR 545), has decided the following substantial

questions of law raised for its resolution in terms of Section 260-A of the Income Tax Act 1961:

1. Whether on the facts and circumstances of the case, the learned Income Tax Appellate Tribunal erred in upholding the disallowance under Section 40 (a)(ia) of the Income Tax Act, 1961 as against the appellant?

2. Whether the learned Income Tax Appellate Tribunal erred in failing to appreciate the proposition that a disallowance of expenses under Section 40(a)(ia) of the Income Tax Act, 1961 would not lie on payments already made?

3. Whether the learned Income Tax Appellate Tribunal erred in concluding that the payments made by the appellant were tantamount to Royalty?

4. Whether the learned Income Tax Appellate Tribunal erred in relying upon the decision of a Co-ordinate Bench of the Tribunal in the Shri Balaji Communications case?

5. Whether the learned Income Tax Appellate Tribunal's findings are perverse on the facts and circumstances of the case, and therefore liable to be set aside?"

37. The Division Bench was concerned with the case of an individual who was carrying on business in purchase and sale of Telugu Films and whether she was liable to deduct tax at source under Section 194-J of the Act on the amounts paid for purchase of film rights. The case of the Department was that the amount paid for purchase of film rights was of the nature of royalty liable to deduction of tax at source under Section 194-J of the Act. The rights had been transferred by the petitioner for a period of 99 years and the assessee contended that the transfer for 99 years would constitute an outright sale of all rights in the film whereas the Department contended that the copy right in the film was itself only for a period of 60 years. While deciding this issue the Division Bench of this Court in Para-17 says as follows:

'17. We have seen the various conditions contained in the sample transfer deed and there is a transfer of copy right in favour of the assessee. Though the agreement speaks of perpetual transfer for a period of 99 years, in terms of Section 26 of the Copy Right Act, 1957, in the case of cinematographic film, copy right shall subsist until 60 years from the beginning

of the calendar year next following the year in which the film is published. Therefore, the agreement in the case on hand, is beyond the period of 60 years, for which the copy right would be valid, the document could only be treated as one of sale."

38. In the present case admittedly all agreements use the term 'perpetual transfer' and some transfer the asset specifically for a period of 99 years, both in excess of the period of 60 years set out under the provisions of the CR Act. The assignment is, simplicitor, permanent/perpetual and seen not temporary. In this backdrop, the conclusion of the respondents to the effect that a perpetual transfer or a transfer for 99 years, though in excess of the period stipulated in the Act, is temporary, appears, to me, fundamentally unsound and defies logic.

39. In fine, I am of the categoric view that the provisions of the CR Act have not been looked at or applied in the proper perspective in the impugned SCN/orders. In the light of the discussions and reasons as set out above I am inclined to set aside the impugned show cause notice (WP.No.30085 of 2018) and orders-in-original (WP.Nos.29206 & 14425 of 2018, 1199 & 5131 of 2019). The Department is given full liberty to initiate proceedings afresh, bearing in mind the observations and conclusions as above, in accordance with law. The aspect of limitation shall also be gone into afresh bearing in mind the burden that is imposed upon the Department in terms of Section 73 and specifically the proviso thereto, in the facts and circumstances of the present assesseees. The writ petitions are allowed in the above terms. Consequently, connected miscellaneous petitions are closed with no order as to costs.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

ska
To

1. The Joint Director,
O/o. The Directorate General of GST Intelligence,
Chennai Zonal Unit, C-3 C-Wing, 2nd Floor,
Rajaji Bhavan, Besant Nagar, Chennai - 600 0902

2. Additional Commissioner,
O/o. The Commissioner of GST & Central Excise,
Chennai South Commissionerate,
No.692 M.H.U. Complex, Nandanam,
Chennai 600 035
3. Principal Additional Director General,
Directorate General of GST Intelligence,
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4. The Principal Commissioner,
Office of the Principal Commissioner of CGST & Central
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Chennai North Commissionerate,
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Chennai - 600 034
5. The Commissioner of GST & Central Excise,
Chennai South,
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+4ccs to Mr.V.Sundareswaran, , Advocate SR.No. 38108
+1cc to Mr.G.Syed Noorullah, , Advocate SR.No. 37510
+1cc to Mr.M.K.vaitheeswaran , Advocate SR.No. 37945
+1cc to Mr. Hari Krishnan, Advocate SR.No. 37312
+5ccs to Mr.Joseph prabhakar , Advocate SR.No. 38282
(21/08/2019)

W.P.Nos.30085, 14425 & 29206 of 2018
5131 & 1199 of 2019 &
WMP Nos. 35098, 17040 & 34134 of 2018
& 5849 & 1351 of 2019

A.SK(03/06/2019)

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