



Ownership and Transfer of ‘Musical Work’ and ‘Sound Recording’ – A Case for Service Tax

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In the music industry, lyricists and composers enter into contracts with the cinematograph film producers for the incorporation of their work into cinematograph films. However, the ownership of such copyrighted works is dependent on the nature of the contract entered into between the parties and may lead to implications under the service tax regime. The Madras High Court is currently deciding the veracity of the order passed by the Commissioner of Goods & Services Tax and Central Excise, holding A.R. Rahman liable for paying service tax on the alleged services rendered by him. This paper analyses the nature of contracts that individuals like A.R. Rahman might enter into with the producers of the cinematograph film producers from the lens of the Indian Copyright Act, 1957 and thereafter discusses the possible implications of such contracts from the prism of the service tax regime.

Keywords: Copyright, Economic Rights, Musical Work, Cinematographic Film, Service Tax, Contract of Service

Taxing an event is not easy when such a taxable event inter-plays with other laws. This is evident from the complex issues that arise when the taxman levies tax on the economic exploitation of Intellectual Property (IP). Taxation of IP has become an important area of concern for IPR holders since it may land such IPR holders in legal battles, especially with the tax authorities as to the inter-play between IP and its taxation is complex. This is a common phenomenon for both direct and indirect taxes (including the pre-GST and GST regimes). One such instance is the recent dispute that is pending adjudication before the Hon'ble Madras High Court in the case of A.R. Rahman involving copyright and its taxation aspects under the indirect tax laws.

In February 2020, the Madras High Court stayed the operation of the order passed by the Commissioner of Goods & Services Tax and Central Excise (Commissioner of GST) holding A.R. Rahman liable for paying service tax and penalty for not paying service tax on time on the alleged services provided by him.¹

The three services that were in contention before the Commissioner of GST included: (1) composition,

arranging, recording, and directing of songs/music for movies at the behest of the producer and as per the requirement of the director; (2) conducting live concerts in India and outside India; and (3) royalties received for public performances of A.R. Rahman's work and collected through the Indian Performing Right Society Limited (IPRS). This paper is limited to the discussion with respect to the first service, which is composition, arranging, recording, and directing of songs/music for movies at the behest of the producer and as per the requirement of the director.

This case has two broad aspects involved in it, one related to copyright and the other being related to indirect tax. This paper is divided into two parts analysing both these aspects in detail. The analysis in the present paper is restricted to the information provided in the article that was published in *The Hindu*² and other facts disclosed through the orders of the Madras High Court.³ Thus, for this paper, the factual position to be considered is that A.R. Rahman composed songs for a movie at the behest of the producer and as per the requirements of the director of a movie.⁴ Furthermore, he received consideration for performing his songs⁵ in live concerts in India and outside India and consideration in the form of royalties for the public performances of his work

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through IPRS. The Commissioner of GST held that A.R. Rahman had not duly paid the service taxes for the above said consideration received as they are in the nature of service, liable for service tax under the pre-GST regime. Based on these limited facts, this paper aims to analyse the legal position both under the copyright and the old indirect tax regime (i.e., service tax) in India and thereby examines the interaction of copyright with taxation in detail.

Nature of Copyright Works Created

With this present dispute, the issue of copyright ownership in lyrics, musical compositions and sound recordings for a cinematographic film are brought to the limelight. Therefore, the question related to the ownership of the lyrics, musical compositions and sound recordings also needs to be answered. It is known that in most cases, as an industry practice, the lyricist and the composer of the music assign certain rights vested with them by virtue of Section 14 of the Copyright Act, 1957 (CA, 1957) to the producer of the 'sound recording'. However, in the present case, A. R. Rahman might have been both the composer and the producer of the 'sound recording'.

In most cases, the provisions of the contract between the producer of the cinematograph film and the authors of the other works that are incorporated in the said cinematograph film will clearly identify who will be the owner of the copyright created. However, the contractual terms of the present dispute are not much disclosed. Thus, the authors intend to consider both scenarios: first, where A. R. Rahman is the owner of the 'musical work'; and second, where the movie producer is the owner of the 'musical work'.

To understand these two positions, it is pertinent to look at the provisions of the CA, 1957 and the relevant decisions of the Supreme Court and the High Courts of India. According to Section 13 of the CA, 1957, 'copyright' subsists in the following classes of work: original literary, dramatic, musical and artistic works; Cinematograph films and Sound recording.

Section 2(p) of the CA, 1957, defines 'musical work' as "*a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music*". Thus, composing songs for the cinematograph film would inevitably fall under the ambit of the 'musical work'.

Similarly, Section 2(xx) of the CA, 1957, defines 'sound recording' as "*a recording of sounds from*

which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced". If, the composer themselves have arranged recordings and recorded the music with lyrics i.e., combining of 'musical work' with lyrics with the help of other instruments and playback singers, etc., then it amounts to commissioning of a work of 'sound recording'. In brief, music composed for the incorporation into a movie fall under the definition of 'musical work' and recording of the same with lyrics comes under the definition of 'sound recording'. A song in a work of cinematograph film is created out of different works namely: literary work, 'musical work', and 'sound recording'. The authors of each of the works may be different.

Author

After establishing the nature of the work produced by A. R. Rahman, it is important to identify who is the author of such work in accordance with the provisions of the CA, 1957. According to Section 2(d) of the CA, 1957, the author of a 'musical work' is the composer,⁶ while in the case of a 'sound recording', it is the producer.⁷

Thus, the author of the 'musical work' composed by A. R. Rahman shall be A. R. Rahman himself. However, if A. R. Rahman is not the producer of the 'sound recording' then he will not be considered as the author of the 'sound recording'. Having said this, even in a case where A. R. Rahman is the author of the 'musical work' (and 'sound recording'), it is not necessary that he will always be the owner of such works. This concept of ownership in a copyright work is analysed in the next part.

First Owner

According to Section 17 of the CA, 1957, the author of the work is the first owner of the copyright. However, this general rule is subject to proviso mentioned in this section. The clause (c) of the first proviso to the Section 17 of the CA, 1957 provides that if the work is made in the course of the author's employment under a contract of service, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein. Thus, a difference is clearly demarcated in terms of the first owner for the work created under a contract of service *vis-à-vis* a contract for service.

This clause (c) of the first proviso is further subject to the second proviso of the Section 17 of the CA,

1957 which was inserted in the CA, 1957 by the Amendment Act of 2012.⁸ This second proviso provides that in case of any work incorporated in a cinematograph work, clause (c) of the first proviso shall not affect the right of the author in the work referred to in Section 13(1)(a)⁹ of the CA, 1957. To fully understand these exceptions to the general rule of ownership, it is important to understand the difference between contract *of* service and contract *for* service.

Contract of Service v Contract for Service

The phrases 'contract *of* service' and 'contract *for* service' have been used in various laws; these include the intellectual property rights, consumer protection, income tax, indirect tax, labour laws amongst others. The adjudicating authorities (Courts and Tribunals) have time and again pointed out that there is no straight jacket formula to establish whether a contract is '*of* service' or is '*for* service'. It has been held in numerous judicial decisions that the fact and circumstances of each case would determine the nature of the contract. However, there are some factors which provide guidance to such a determination. This part of the paper will discuss these varied factors.

Control Test

Halsbury's Law of England distinguishes a contract *of* service from a contract *for* service in terms of the control one person has over another. In a contract *of* service, the relationship between the two parties is that of 'an employer-employee'; while in a contract *for* service, it is that of an 'independent contractor'. Thus, the factors that need to be considered while determining the nature of the contract are: the direct control of the employer¹⁰, the independence of the person who renders services and the place where the services are rendered.¹¹ In cases of professionals rendering services, it is important to consider whether the services provided by them are an integral part of the business or not. If the services are integral to the business, then it is a contract *of* service; and if they are not, then it is a contract *for* service.¹² In other words, "*the master may order or require what is to be done; while in the other case he may not only order or require what is to be done but how it would be done.*"¹³

Integration/Organisation Test

With the passage of time, Integration Test/Organisation Test has become one of the factors to

consider while adjudicating the nature of the contract. In *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans*¹⁴, Lord Denning said:

"One feature that seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

In *Beloff v Pressdram*,¹⁵ Ungood Thomas J. after discussing various decisions observed:

"The test which emerges from the authorities seems to me, as Lord Denning said, whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether his work is not integrated into the business but is only accessory to it. The former is contract of service and the latter is contract for service."

Similarly, the Supreme Court of India in *Workmen of Nilgiri Coop. Mkt. Society Ltd. v State of T.N.*¹⁶ formulated the integration test as "*whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent.*" The Supreme Court further recognised that the control test and the organisation test are not the only factors that are decisive to this question. It held that other factors also have a bearing on this question such as: who the appointing authority is; who is the paymaster; who can dismiss; how long alternative service lasts; the extent of control and supervision; the nature of the job e.g. whether it is professional or skilled work; nature of establishment; the right to reject.

Economic Reality Test

In *US v Silk*,¹⁷ the Supreme Court of the USA formulated a new test, called the economic reality test. The crucial factors that were to be considered in this test include "*the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operation.*"

The Queen's Bench in *Market Investigations Ltd. v Minister of Social Security*¹⁸ held as follows to decide the question of contract *of* service or *for* service:

"The fundamental test to be applied was whether the person who had engaged himself to

perform the services was performing them as a person in business on his own account. No exhaustive list had been compiled of the considerations which were relevant in determining that question, nor could strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that could be said was that control would always have to be considered, although it could not be regarded as the sole determining factor; and that factors which might be of importance were such matters as whether the man performing the services provided his own equipment, whether he hired his own helpers, what degree of financial risk he took, what degree of responsibility for investment and management he had, and whether and how far he had an opportunity of profiting from sound management in the performance of his task.” [Emphasis supplied]

Recently, the Supreme Court of India in *SushilabenIndravadan Gandhi &Anrv The New India Assurance Company Limited & Ors*,¹⁹ analysed all the different tests²⁰ and held:

“Given the fact that this balancing process may often not yield a clear result in hybrid situations, the context in which a finding is to be made assumes great importance. Thus, if the context is one of a beneficial legislation being applied to weaker sections of society, the balance tilts in favour of declaring the contract to be one of service.....On the other hand, where the context is that of legislation other than beneficial legislation or only in the realm of contract, and the context of that legislation or contract would point in the direction of the relationship being a contract for service then, other things being equal, the context may then tilt the balance in favour of the contract being construed to be one which is for service.”

Now, that the various tests have been laid down, it is important to look at how the courts in India have applied them in the context of copyright. For this, two cases: *Zee Entertainment Enterprises Ltd. v Gajendra Singh & Others*²¹ of the Bombay High Court and *Gee Pee Film Pvt Ltd v Pratik Chowdhary & Ors*²² of the Calcutta High Court have been analysed.

The Bombay High Court in *Zee Entertainment Enterprises Ltd. v Gajendra Singh & Others*,²¹ applied the above-mentioned factors amongst others to

determine the question whether the defendant was in contract of service or for service and therefore, owned the copyright in the literary work and cinematographic film or not, alleged to be infringed by the plaintiff. The court, after analysing the clauses of the contract²³ observed that:

- a. Clauses 1 to 5 pointed towards the relationship of a contract for service.
- b. Clause 7 pointed towards contract of service since it entitled the plaintiff to post defendant anywhere in India and a consultant is not generally subject to the same terms.
- c. Clause 11 also pointed of a contract of service as it is generally not required for a consultant to be medically fit. This condition is generally found in a contract of employment.

On the basis of the above analysis and other factors pointing towards contract of service such as the defendant being subject to performance rating by the plaintiff; the defendant also being obligated to self-assessment of his performance with the plaintiff, the court held that the factors indicating contract of service outweigh the factors indicating otherwise and thus, the relationship between the plaintiff and the defendant was in the nature of contract of service.

The Calcutta High Court in *Gee Pee Film Pvt Ltd v Pratik Chowdhary & Ors*²⁴ was faced with a question of who the copyright owner of the works in case of a commissioned work is. The factual matrix of the case is that the first defendant is a singer of Bengali songs. The second defendant is engaged in the business of manufacture and sale of cassettes, compact discs and other sound recording systems. The third and fifth defendants are song lyricist, and music composer respectively and the fourth defendant is also a lyricist.

The plaintiff had commissioned the third and fifth defendants to compose Bengali non-film lyrics and the first defendant had to sing, which were then to be released on cassettes and other sound recording systems. The plaintiff and the defendants had an oral agreement with respect to two songs. Thus, it was claimed by the plaintiff that the copyright in respect of the lyrics, music, literary and dramatic work as well as the ‘sound recording’ related to the two songs was owned by him.

The defendants argued that until it is established that the songs were composed and written in the course of employment by the defendants under a contract of service or apprenticeship with the plaintiff,

the plaintiff could not have any copyright over the said songs.

The court analysed the meaning of 'commissioned' and held that the plaintiff had engaged the defendants for writing, composing, and singing the two songs on remuneration. Thus, the parties had a 'contract for service' and not a 'contract of service' between them. The Court further held:

"It may not be out of place to mention here that Section 17 of the Act specifies the only instances where an author, although engaged under a 'contract for service', loses copyright. Those are the cases of taking photograph, drawing painting or portrait, engraving and making cinematograph film. In the present case, the defendants were not engaged for any of the aforesaid jobs."

With respect to the ownership of the 'sound recording', it is the producer who is considered as the owner of the 'sound recording'. In this case, the plaintiff has paid the hire charges of the studio and for recording. However, the plaintiff made no averment that it had taken any 'responsibility' of such recording. According to the court, to be considered as the producer of the 'sound recording', twin conditions of 'initiative' and 'responsibility' of the recording have to be proved. The Court held that *"The word 'responsibility' appearing in Section 2(uu) of the Act, in my view, does not refer to financial responsibility, but means 'consequential legal liability for such recording.'"* Thus, the plaintiff was not considered to be the producer of the 'sound recording'. In the light of the above discussion, it is worth examining the Section 17 of the CA in detail.

Section 17 - Exceptions to the General Rule

The first proviso to Section 17 states that in cases where the work is held to be created in pursuance of a contract of service, the employer shall be the first owner of the copyright of such works in the absence of any agreement to the contrary. A second proviso was added to this Section *vide* the 2012 amendment which provided an exception to the said exception. The second proviso states that irrespective of a contract of service, for any work of nature as referred in Section 13(1)(a)²⁵ of the CA, 1957 that is incorporated in a cinematographic film, the first ownership in that work remains with the person who has created that work. And accordingly, they shall be vested with all rights of the author in respect of that

work created under a contract of service.²⁶ However, it is yet to be seen what these 'rights' would include. One may argue it includes all rights as mentioned in Section 14 of the CA, 1957. It could also include the moral rights of the author. It could further mean that the term 'rights' is with respect to the right of the author to receive royalties in terms of Section 18 & 19 of the CA, 1957.

Since the terms of contract are not disclosed, a general conception with respect to the ownership and authorship can be summed up in the following scenarios with regards to case of A. R. Rahman:

(a) Scenario 1 – Contract for Service:

If the contract between A.R. Rahman and the movie producer was in the nature of contract for service, A. R. Rahman will be the author and the first owner of the 'musical work' and 'sound recording'. In this case, A. R. Rahman might have assigned some of the rights vested with him by virtue of Section 14 of the CA, 1957 to the movie producer.

(b) Scenario 2 – Contract of Service:

In case the contract was in the nature of contract of service, A. R. Rahman will only be the author and not the first owner of the 'musical work' (provided the work is not incorporated in a cinematographic film) and 'sound recording'.

However, in case where the 'musical work' is incorporated in a cinematographic film, A. R. Rahman will be the author and the first owner of the 'musical work'. In such a scenario, A. R. Rahman will become the first owner of the 'musical work' in view of second proviso to Section 17 of the CA, 1957. With respect to the 'musical work', A. R. Rahman might have assigned only some of the rights mentioned in Section 14 of the CA, 1957 to the movie producer. However, in case of 'sound recording', he will only be the author of the 'sound recording', not the first owner of the work.

However, it is important to note that the possible interpretations of the word 'rights' in the second proviso to Section 17 would only be beneficial to a music composer like A. R. Rahman when they are granted for all the three different types of rights, namely, (1) the economic rights as mentioned in Section 14 of the CA, 1957, (2) the moral rights as mentioned in Section 57 of the CA, 1957 and (3) the right to receive royalties in terms of Section 18 of the CA, 1957. This interpretation of the word 'rights' will be applicable in both types of contracts, that is, contract of service and contract for service.

It is *vis-à-vis* important to note that in cases where A. R. Rahman has only assigned some of his economic rights in the work to the movie producer, then for the remaining economic rights, A. R. Rahman will still be considered the owner of such copyright. According to the disclosed facts, since A. R. Rahman has conducted live concerts within and outside India, it is important to know whether such performances were in pursuance of the economic rights retained by him under the contract. In the light of the above discussions, the next part of the paper examines the legal position of service tax and its applicability to the economic realisation of copyright through different means.

Service Tax *vis-à-vis* Transfer of ‘Musical Work’ and ‘Sound Recording’

Service Tax was introduced by the Finance Act, 1994 (FA, 1994) in India. According to Section 66 of the FA, 1994, the charging Section of service tax levied a tax at the rate of 12% of the value of taxable services referred in Section 65(105) of FA, 1994. Thus, service tax was levied on ‘specified services’. This legal position remained in force until 2012.

In 2012, a new provision, namely Section 66B, was introduced through an amendment²⁷ to the FA, 1994, as the new charging section. After the amendment, service tax was levied a tax at the rate of 12%²⁸ 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. The meaning of the term ‘service’ was also inserted by the 2012 amendment provided hereunder:

“65B (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 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;
- b) a provision of service by an employee to the employer in the course of or in relation to his employment;

c) fees taken in any Court or tribunal established under any law for the time being in force.”
[Emphasis supplied]

Thus, service tax was chargeable to all services (including declared services) after the 2012 Amendment, unlike before, where only taxable services referred to in Section 65(105) of FA, 1994 were chargeable to service tax. The list of declared services was provided in Section 66E of the FA 1994. It includes “*temporary transfer or permitting the use or enjoyment of any intellectual property right*”. Thus, temporary transfer or permitting the use or enjoyment of any intellectual property was chargeable to service tax.

However, it is pertinent to mention that the Central Government in the exercise of its power in Section 93 of FA 1994, had exempted²⁹ the following services from the levy of service tax:

“15. *Services provided by way of temporary transfer or permitting the use or enjoyment of a copyright –*

(a) covered under clause (a) of sub-section (1) of Section 13 of the Copyright Act, 1957 (14 of 1957), relating to original literary, dramatic, musical or artistic works; or

(b) of cinematograph films for exhibition in a cinema hall or cinema theatre;”

Thus, by virtue of this exemption, temporary transfer or permitting the use or enjoyment of a copyright covered under Section 13(1)(a)³⁰ of CA, 1957 relating to original literary, dramatic, musical or artistic works was declared to be exempted from service tax despite it being chargeable to service tax as it was covered under as one of the declared services.

Applying the law to A. R. Rahman’s case, two broad possibilities arise (A .R. Rahman is the owner of both ‘musical work’ and ‘sound recording’). First, that he is working under the contract *of* service and second, he is working under a contract *for* service.

(a) Scenario 1– Contract *for* Service:

If the contract between A. R. Rahman and the movie producer was in the nature of a contract *for* service, A. R. Rahman will be the author and the first owner of the ‘musical work’ and ‘sound recording’. In this case, A. R. Rahman might have assigned the right to incorporate his ‘musical work’ into the cinematographic film to the movie producer.

Being the author and the first owner of the 'musical work', A.R. Rahman, for temporary transfer or permitting the producer of movies to incorporate the 'musical work' into a cinematographic film, shall not be held liable for paying service tax because this service is exempt³⁰ from the levy of service tax. However, he shall be held liable for paying service tax related to the work of sound records as the same does not fall under the said exemption.³¹

Being the author and the first owner of the 'musical work' and 'sound recording', A.R. Rahman, for permanently assigning the copyright in the 'musical work' and 'sound recording' to the producer, shall not be held liable for paying service tax because it will be in the nature of permanent transfer of title in goods³² which is not included in service that is chargeable to service tax.

(b) Scenario 2– Contract of Service:

If the contract between A.R. Rahman and the movie producer was in the nature of a contract of service, A.R. Rahman will only be the author and not the first owner of the 'musical work' (provided the work is not incorporated in a cinematographic film) and 'sound recording'. Therefore, A.R. Rahman cannot temporarily transfer or permit the use or enjoyment of the copyright for which he is not the owner as the employer, producer in this case, will be the first owner of the copyright.; and accordingly, he will not be held liable for paying service tax towards the services rendered i.e., composing 'musical work' and commissioning of 'sound recording'.

However, in case of a contract of service, as discussed earlier, where the 'musical work' is incorporated in a cinematographic film, A. R. Rahman will be the author and the first owner of the 'musical work'. In such a scenario, A. R. Rahman will become the first owner of the 'musical work' by virtue of second proviso to Section 17 of the CA, 1957. However, in case of 'sound recording', he will only be the author of the 'sound recording', not the first owner of the work.

Being the author and the first owner of the 'musical work', even in respect of a contract of service, A. R. Rahman, for temporary transfer or permitting the producer of movies to incorporate the 'musical work' into a cinematographic film, shall not be held liable for paying service tax because this service is exempt³³ from the levy of service tax.

By the same logic of being the author and the first owner of the 'musical work', A. R. Rahman, for permanently assigning the copyright in the 'musical

work' to the producer, shall not be held liable for paying service tax because it will be in the nature of permanent transfer of title in goods³² which is not included in service that is chargeable to service tax.

As far as the 'sound recording' is concerned, in a contract of service, A. R. Rahman will only be the author and not the first owner of the 'sound recording' regardless of the fact whether the work is incorporated in a cinematographic film. Therefore, A. R. Rahman cannot temporarily transfer or permit the use or enjoyment of the copyright for which he is not the owner as the employer, producer in this case, will be the first owner of the copyright

Conclusion

The case of A. R. Rahman has brought to light issues that are pertinent to both copyright and tax. The main issue in this case arises from the determination of the nature of the contract that is entered into between A. R. Rahman and the cinematograph film producer. The ownership and tax liabilities in case of a contract of service are different from those under a contract for service.

As discussed, copyright's ownership/authorship in the work being a 'musical work' will vest with A. R. Rahman irrespective of the nature of contract he is the first owner in both a contract for service and a contract of service, provided in the contract of service the 'musical work' is incorporated in a cinematograph film. Being vested with copyright in 'musical work' regardless of the nature of contract, he shall not be held liable for transfer of any temporary or permanent transfer of his copyright to the producer and service tax thereon. The question of applicability of service tax towards sound recording can be referred as per discussion above.

Further, the cinematograph film producer will only become the owner of the underlying work, which is the 'musical work', if and only if A. R. Rahman completely transfers all his rights in the said 'musical work' to the film producer. However, even after such transfer, A. R. Rahman will still possess moral rights and the right to receive royalties with respect to his original 'musical work'.

However, the question of applicability of service tax on the commissioning of 'musical work' and its temporary/permanent transfer remain disputed though the provisions of CA, 1957 clearly support the stand of A. R. Rahman and other composers who might have been similarly placed with him. The litigations

revolving around this issue is a matter of great concern for the musical industry. The tax authorities must understand and appreciate the inter-play between taxation and copyright laws to resolve such complex issues. Proper appreciation of inter-play between tax laws and IP laws will reduce unnecessary litigation and create a conducive environment for creation of copyright and other IP assets which can be exploited for socio-economic development of the nation. Similar issues may arise in the present GST regime which will be discussed in the upcoming paper.

References

- 1 *A. R. Rahman v Commissioner of GST and Central Exercise*, in WP No. 3354 of 2020 Order dated 12 February 2020.
 - 2 Mohamed I S, Can film songs be termed as ‘service’? Case filed by A.R. Rahman poses interesting questions, *The Hindu*, 17 February 2020.
 - 3 The orders passed by the Madras High Court dated 12 February and 4 March 2020.
 - 4 There are only limited facts in the public domain. Thus, the paper aims to analyse the dispute from all the possible ways.
 - 5 Authors are considering songs that are and are not included in a movie.
 - 6 Section 2(ffa) of the CA, 1957: ‘composer’, in relation to a musical work, means the person who composes the music regardless of whether he records it in any form of graphical notation.
 - 7 Section 2(uu) of the CA, 1957: ‘producer’, in relation to a cinematograph film or sound recording, means a person who takes the initiative and responsibility for making the work.
 - 8 This amendment was effective from 21 June 2012.
 - 9 Original literary, dramatic, musical and artistic works.
 - 10 *University of London Press Ltd v University Tutorial Press Ltd*, (1916) 2 Ch 601.
 - 11 Halsbury’s Laws of England, Vol. 9, fourth edition, Para 860.
 - 12 *Stephenson, Jordan and Harrison v Macdonald and Evans* (1952) 69 RPC 10.
 - 13 185 - Halsbury’s Laws of India (IPR-I, Vol 22) 2nd ed 1. Copyright (13) Ownership of Copyright, B. *Contract of Service versus Contract for Service* [185.255].
 - 14 (1952) 1 TLR 101, 111.
 - 15 [1973] RPC 765.
 - 16 (2004) 3 SCC 514.
 - 17 331 US 704.
 - 18 (1968) 3 All ER 732, 737, 738.
 - 19 Civil Appeal No. 2235 of 2020.
 - 20 The Court analysed the entire test in detail. The relevant portions are: “24.A *conspicuous* of all the aforesaid judgments would show that in a society which has moved away from being a simple agrarian society to a complex modern society in the computer age, the earlier simple test of control, whether or not actually exercised, has now yielded more complex tests in order to decide complex matters which would have factors both for and against the contract being a contract of service as against a contract for service.
- The early ‘control of the employer’ test in the sense of controlling not just the work that is given but the manner in which it is to be done obviously breaks down when it comes to professionals who may be employed. A variety of cases come in between cases which are crystal clear - for example, a master in a school who is employed like other employees of the school and who gives music lessons as part of his employment, as against an independent professional piano player who gives music lessons to persons who visit her premises. Equally, a variety of cases arise between a ship’s master, a chauffeur and a staff reporter, as against a ship’s pilot, a taxi driver and a contributor to a newspaper, in order to determine whether the person employed could be said to be an employee or an independent professional.
- The control test, after moving away from actual control of when and how work is to be performed to the right to exercise control, is one in a series of factors which may lead to an answer on the facts of a case slotting such case either as a contract of service or a contract for service. The test as to whether the person employed is integrated into the employer’s business or is a mere accessory thereof is another important test in order to determine on which side of the line the contract falls. The three-tier test laid down by some of the English judgments, namely, whether wage or other remuneration is paid by the employer; whether there is a sufficient degree of control by the employer and other factors would be a test elastic enough to apply to a large variety of cases. The test of who owns the assets with which the work is to be done and/or who ultimately makes a profit or a loss so that one may determine whether a business is being run for the employer or on one’s own account, is another important test when it comes to work to be performed by independent contractors as against piece-rated labourers. Also, the economic reality test laid down by the US decisions and the test of whether the employer has economic control over the workers’ subsistence, skill and continued employment can also be applied when it comes to whether a particular worker works for himself or for his employer.
- The test laid down by the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 A.C. 374, namely, is the person who has engaged himself to perform services performing them as a person in business on his own account, is also an important test, this time from the point of view of the person employed, in order to arrive at the correct solution. No one test of universal application can ever yield the correct result. It is a conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight. Ultimately, the Court can only perform a balancing act weighing all relevant factors which point in one direction as against those which point in the opposite direction to arrive at the correct conclusion on the facts of each case.”
- 21 2007 SCC OnLine Bom 920.
 - 22 AIR 2002 Cal 33.
 - 23 The clauses of the Contract as per the Judgment are extracted here: “With reference to the interview we had with you, the management is pleased to accept the offer of your services as

a Consultant on the following terms and conditions with effect from the day you join us i.e. 23 July 1992.

1. You will be paid a Consultancy fee of Rs. 10,000/- (Rupees Ten Thousand only) per month all inclusive. You are required to submit your consultancy bill for your services rendered every month to enable us to effect payment. You will be on contractual employment for Twenty Four months, after which this arrangement unless terminated shall stand renewed for a further period of Twenty Four months.
2. You will not be entitled to any other company benefits.
3. However, conveyance expenses incurred while on official duty shall be reimbursed as per company's rules. This does not include conveyance expenses incurred while commuting to and from office and residence.
4. You will have to make your own arrangements for your income tax and other statutory returns if any as applicable.
5. You will be working in an advisory capacity and put your best efforts in discharging the jobs assigned to you from time to time by the Management.
7. This arrangement will be subject to your condition that you will be posted and transferred anywhere in India, or in any department, office or establishment owned or managed by the company depending upon the exigencies of the company's work. At present, you will be posted in Bombay.
9. This arrangement can be terminated by either party by giving three months notice of its intentions to do so before the expiry of the contract period.
10. Upon termination of your contract you will return to the Company all the papers, documents and any other Company property that might have come into your possession during the course of your employment with the company, and you will not retain any copies of extracts thereof.
11. This arrangement is

subject to your being declared medically fit by our medical advisors. At the time of joining you may be asked to."

- 24 AIR 2002 Cal. 33.
- 25 The works that are referred in Section 13(1)(a) are original literary, dramatic, musical and artistic works.
- 26 SoodU, The tough of 'Jadoo' in the Copyright (Amendment) Act, 2012: Assessment of the amendments to Section 17, 18 and 19, *NUJS Law Review*, 5 (2012) 529.
- 27 This amendment was effective from 1 July 2012.
- 28 It was amended to 14% by the Finance Act, 2015, effective from 1 June 2015.
- 29 Notification No. 25/2012-ST, dated 20-6-2012 as amended by Notification No. 3/2013-ST, dated 1 March 2013.
- 30 The works that are referred in Section 13(1)(a) are original literary, dramatic, musical and artistic works.
- 31 Second proviso to Section 17 of the CA, 1957.
- 32 In *Bharat Sanchar Nigam Ltd. v Union of India* [(2006) 3 SCC 1], it was held that incorporeal right of copyright could be regarded as 'goods' which would be subject to sales tax. This case followed the decision in *Tata Consultancy Services v State of Andhra Pradesh* [(2005) 1 SCC 308] wherein it was held that 'goods' may be a tangible property or an intangible and goods has the attributes having regard to (a) its utility; (b) capable of being bought and sold and (c) capable of being transferred, delivered, stored and possessed.
- 33 A provision of service by an employee to the employer in the course of or in relation to his employment is not included in service that is chargeable to service tax.