

Read : Application dt.29.09.2006 by The Indian Performing Right Society Limited.
Heard : Sh. C.B.Thakar, Advocate alongwith Smt. Vibha Ojha, Manager (Accounts).

PROCEEDINGS

(under sections 56 (1) (a), (b), (d) (e) and (2) of Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2006/Adm-5/82/B-1

Mumbai, dt. 4 | 2 | 2016

The Indian Performing Rights Society Limited (referred to as IPRS), situated at 208, Golden Chambers, 2nd Floor, New Andheri Link Road, Andheri (W), Mumbai - 400053, request determination of the following questions :

1. Whether IPRS is dealer under MVAT Act?
2. Whether IPRS is required to get registered under the said Act?
3. Whether the licensing transaction amounts to 'sale' as per above Act?
4. If answers to above questions are in affirmation then the rate of tax on the said transaction.

02. FACTS AND CONTENTION

The application states thus -

"M/s. The Indian Performing Rights Society Ltd. (referred to as IPRS) is a company registered under Companies Act, 1956. IPRS is established as per provisions of section 33 of the Copyright Act, 1957. It accordingly holds licence in Form IID of the Copyright Rules. As per provisions of section 33 of Copyright Act, 1957, the society is entitled to carry on activity of issuing or granting licences in respect of Copyrighted work on behalf of original Copyright owners and who are members of IPRS. The object of the IPRS in its Memorandum of Association is as under:

"(1) To exercise and enforce on behalf of Members of the company, being the composers of any musical works or the authors of any literary or dramatics works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (hereinafter called "the owners") all right and remedies of the owners by virtue of the Copyright Act, 1957, or otherwise in respect of any exploitation of their works by public performance, by broadcasting or by causing the same to be transmitted to subscribers to a diffusion service or by recording on mechanical contrivances or records or the publication of such works."

The main function of the IPRS is to grant licence to needy persons like Hotels, banks etc. to publicly perform the music and other musical rights on behalf of original copyright owners, who are also members of IPRS. The above licence is required as per Section 30 of Copyright Act. The bills are raised by the IPRS for royalty based on predetermined parameters. The services of IPRS are limited to copyrights of its members and no services are given to any non-members.

The copy of Memorandum of Association, sample licence contract entered into with licensee and the bill raised for royalty charges are enclosed herewith for ready reference. The brochure containing details about activities of IPRS is also enclosed. The licence to use is granted on non exclusive basis on behalf of the copyright owners. The revenue collection is distributed to the member Copyright owners after deduction for necessary administrative expenses.

It can be seen that IPRS is performing statutory duty cast under Copyright Act. As clear from the above object clause it is only rendering services to the Copyright owners who have become members of IPRS. There is no element of business activity. The licensing activity also cannot fall in the definition of 'sale'. However to have statutory guidance for future, the IPRS hereby applies to your goodself to determine following questions.

1. Whether IPRS is dealer under MVAT Act?
2. Whether IPRS is required to get registered under the said Act?
3. Whether the licensing transaction amounts to 'sale' as per above Act?
4. If answers to above questions are in affirmative then the rate of tax on the said transaction.

We request to determine the questions at the earliest. Any additional information, as may be required, will be supplied to your goodself on hearing from your office.

If IPRS is held as liable to any tax then on facts and in the circumstances of the case, prospective effect be granted."

In response to the applicant posing the above questions for determination, it is seen that the applicant was informed by letter dt.05.10.2007 that a determination order has been passed in the case of M/s. Phonographic Performance Ltd. (No.DDQ-11/2006/Adm-5/26/B-6 dt.30.04.2007) on the same issues as the applicant. The applicant was informed that the aforesaid determination order dealt with the issues arising from identical/similar circumstances and the same were tested against the term 'sale' as defined under the Maharashtra Value Added Tax Act, 2002 (MVAT Act,2002) which is similar to the one that existed under the Lease Act, 1985, the decision on the present applicant's issue would be an academic one. Since the application would be non-maintainable, the applicant was asked to show-cause as to why the application should not be rejected being non-maintainable, failing which it would be presumed that the applicant had nothing to say in the matter and the matter would be closed.

The applicant responded to the above communication by tendering a submission of dt.20.10.2007 wherein it was stated thus :

"We refer to your above letter by which you have stated that a similar issue is decided in case of Phonographic Performance Ltd. Vide DDQ order dt.30.4.2007. In light of above you have suggested that the deciding of our present application will be academic one. However we submit that this will not be a correct position. Though we can give elaborate grounds for above submission, for sake of brevity we herewith cite before your goodself the important distinguishing factors between the DDQ order already passed and in our case.

1. *In case of Phonographic Performance Ltd. the object clause itself shows that the said society was involved in purchase of records and sale of it. Your goodself have also observed accordingly in para 8 on page 15 of DDQ. In our case we have already reproduced the object clause in our application. It can be seen that there is no any purchase/sale element involved in our case. Our applicant is only collecting licence fees from the users on behalf of the original creators of copyrights i.e. musics etc., who are also the members of the society. Therefore, basically our applicant is rendering services to the copyright owners. Therefore, the element of sales/purchases in goods is absent in our case. Therefore, your order about holding the Phonographic Performance Ltd. As dealer will not apply in our case. Also our application is under Lease Act for which the provisions of 'dealer' where different. Therefore, above DDQ cannot be equated with our case.*

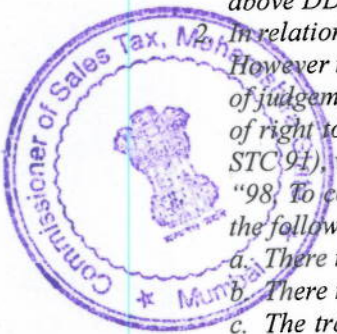
In relation to 'sale' activity also your goodself have held in the DDQ that it is 'sale' activity under Lease. However in our case we submit that we are not giving any exclusive rights to the users. As held in number of judgements, unless the users are given exclusion passion of the goods there cannot be sale by transfer of right to use goods. In this respect a reference can also be made to Bharat Sanchar Nigam Ltd. (145 STC 91) where the principle about lease transactions are discussed. Particularly para 98 says as under: "98. To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

- a. There must be goods available for delivery;*
- b. There must be a consensus ad idem as to the identity of the goods;*
- c. The transferee should have a legal right to use the goods – consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;*
- d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor – this is the necessary concomitant of the plain language of the statute – viz. a "transfer of the right to use" and not merely a licence to use the goods;*
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."*

Therefore in our case, amongst others, we will submit that our transaction will not be sale transaction under lease.

3. *In addition to above there are number of distinguishing factors. However for sake of brevity we are not mentioning all points here but will submit before your goodself as and when the matter is fixed for hearing.*

4. *You also have raised the issue about section 52(3). In this respect we submit that once there are*



distinguishing factors the DDQ in other case cannot apply to our present case. Every case is different case and has to be decided on its own facts. We also submit that, irrespective of anything else, once the DDQ application is filed, the Commissioner of Sales tax is required to decide the same. In this respect we also draw kind attention of your goodself in case of M/s. R. V. Industries (A.107 of 98 of dt.8.9.2000). In this judgment the Hon. Tribunal has directed that the application has to be decided. We are not citing more judgments for sake of brevity but we feel that the above will clear the legal position.

5. We also bring to kind your notice that in our case we have also applied for prospective effect. As you have already clarified in Circular No.25T of 2002 dt.19.9.2002 the prospective effect in one case cannot apply to other case. Therefore, the prospective effect issue required to be decided in each application separately. In light of this also, the deciding of our application separately is necessary.

We hope your goodself will appreciate the above submissions which are in brief but to the point. If your goodself still feel it necessary a personal hearing be given on this point itself, otherwise we further request to take the matter for hearing on merits."

Then it is seen that by letter dt.14.01.2012, the applicant informed about the determination order in M/s. Phonographic Performance Ltd. (cited supra) being reversed by the Hon. Maharashtra Sales Tax Tribunal (Hon. MSTT) in VAT Appeal No.9 of 2007 dt.19.06.2009 which as per the applicant meant that the activity of granting of licenses and collecting money against the same is not liable to VAT. The applicant further informed that no appeal or no further proceedings have been taken up against the said Tribunal order and as such it is final. Hence, the applicant made a point thus -

"Our matter being same, our above application is also required to be disposed off in tune with above Tribunal judgment. We accordingly request to pass DDQ order in our above application holding the activity of the applicant as not liable to VAT."

The applicant having informed as at above that his matter is same as that in M/s. Phonographic Performance Ltd. (cited supra), the contradiction was brought to the notice of the applicant, by letter dt.20.03.2012, that the applicant through an earlier letter dt.20.10.2007 had informed that the determination order in M/s. Phonographic Performance Ltd. (cited supra) was not applicable to the applicant whereas by letter dt.14.01.2012, the applicant informs that the application be disposed off in tune with the Hon. Tribunal's judgment. In view of the contradictory positions through letters, the applicant was asked to attend on dt.28.03.2012 with details as follows :

- (1) Agreement between copyright owner and Society
- (2) The list of members
- (3) The copy of membership application

In response to letter dt.14.01.2012, the applicant gave submission dt.06.02.2012 thus :

"1. In our letter dated 20.10.2007 we have shown difference between the two Organizations in respect of object clause and nature of activity as of rendering services. In our application we have also prayed for prospective effect and accordingly it was submitted that our application be treated separately and be maintained for hearing.

2. In letter dated 14.1.2012 we have pointed out about our transaction being not 'sale' in light of above ratio laid down by Hon. Tribunal in case of Phonographic Performance Ltd. (VAT Appeal No. 9 of 2007 dt.19/6/09).

It be appreciated that we have contended, amongst others, on two counts.

(i) The nature of activity of applicant is of rendering services to members and hence he is not dealer.

(ii) The licensing activity of music right is not leasing activity i.e. 'sale' under Lease Act.

We differed on count (i) In this respect we request to give hearing and decide the issue.

The issue (ii) is now covered by above judgment.

Since the grant of licence is not exclusive, the effect is that it does not fulfill conditions laid down in

BSNL as well as the ratio laid down in above judgment of Phonographic Performance Ltd..

We request to decide the above issue also accordingly, and hold that the application is not liable to tax on given transaction of licensing."

03. HEARING

The case was taken up for hearings on various dates. However, the hearings could not take place. Finally, a hearing in the matter was taken up on dt.06.05.2014 when Sh. C. B. Thakar, Advocate and Smt. Vibha Ozha [Manager Accounts] attended. It was contended thus :

1. The applicant is not a dealer in view of the fact that the applicant is representing individual copyright holders of music who are not dealer by themselves.
2. The activity is not a sale as well as a deemed sale. In support of this, the judgment of the Hon. Maharashtra Sales Tax Tribunal (MSTT) in M/s. Phonographic Performances Ltd. (VAT Appeal No.9 of 2007 dt.19.6.2009).
3. If the determination order is not in favour of the applicant then prospective effect may be given in view of the following:
 - a) The application is pending till long time.
 - b) The issue is complex. There are different judgments.
4. It was admitted that they have collected taxes @ 4/5% though the licensees are not ready to pay tax. In the initial period, the applicant has not collected tax.
5. The applicant requested to give 2 week's time to submit a written submission in the matter.

A written submission dt.28.05.2014 was tendered by the applicant on dt.02.06.2014 which states thus -

"In this DDQ, we have raised following questions;

1. *Whether IPRS is dealer under MVAT Act, 2002?*

In this respect, we bring to your kind knowledge the opening submission made in our application. As stated therein IPRS is a company registered under Companies Act, 1956 as company limited by guarantee. It is non-profit making organization.

In 1996 It was additionally recognized in view of provisions of section 33 of the Copy Right Act, 1957. Therefore, it is not a dealer.

2. *The next question is about registration requirement for applicant-company under MVAT Act, 2002. In this respect, we submit that once the applicant-company is declared as not covered within the definition of 'dealer' then there will not be any requirement for registration. We clarify that the company has no other business requiring registration. As on today, the applicant-company is registered but it is under protest, as applicant-company is challenging that it is not dealer.*

3. *The third question is about nature of transaction effected by applicant-company. As discussed above, the applicant-company enforces copyrights of its member copyright owners, who assign the copyrights to the society, on the users, who use their copyright. For example, a hotel may be using music of some member of the applicant-company and who is owner of such copyright.*

For this purpose, the applicant-company issues licence to the user. The copy of the specimen licence agreement is already submitted on record alongwith bill copy issued by the applicant-company.

Amongst others, it can be seen that the applicant-company is only issuing licence. In the terms it is made clear that it is non exclusive licence.

Under above factual position, a question arises as to whether above licensing transaction falls within the definition of 'sale' in the MVAT Act, 2002.

The definition of 'sale' covers normal sale transaction, as well as deemed sale transaction i.e. works contract and transfer of right to use (lease transaction) etc.

In the case of applicant-company, there is no question of normal sale i.e. outright sale of copyright sale to outsiders.

At the most, issue can arise as to whether transaction is covered by the deemed sale category of lease transaction.

The nature of lease transaction is now settled by number of judgments. There are number of judgment. However, the issue as involved in the case of applicant-company is already settled by Hon'ble Tribunal, there is no need for referring to all such judgments. Reference can be made to the judgment of Hon'ble Tribunal in case of Phonographic Performance Ltd. (VAT Appeal No.9 of 2007 dated 19.6.2009).



In this case, the applicant-company had granted licences for the public performance of gramophone, records etc..The licences were granted on non exclusive basis. Hon'ble Tribunal held that the licence transactions are not lease transactions.

The above judgment is directly on the same point. It may also kindly be noted that to the best of our knowledge, no appeal is filed against above judgment. Therefore, the ratio becomes binding. Since our facts are similar, we request to decide the issue accordingly and to declare that the applicant-company is not carrying on any lease transaction, which can be covered under MVAT Act, 2002.

It may be noted that after the DDQ was passed in case of Phonographic Performance Ltd. (DDQ No. 11/2006/Adm-5/26/B-6 dated 30.4.2007), the applicant company received letter dated 20.3.2012 from your good office stating that the facts in case of applicant-company being same, why the DDQ application of applicant-company should not be disposed off accordingly. This clearly establishes that your good office is also in agreement that so far as nature of transaction is concerned, it is similar to the above DDQ and hence, the outcome of Tribunal Appeal will automatically apply to the case of applicant-company. We have already clarified these issues vide our correspondence letters dated 14.1.2012 and further dated 6.2.2012. Copies of the above correspondence are again submitted to your good office in hearing dated 6.5.2014.

As stated in the above letters, the only distinguishing issue remains is about whether applicant-company is dealer or not?

We have submitted above that applicant-company is not dealer. Therefore, this issue may be decided accordingly.

So far as nature of transaction is concerned, the issue is covered by above Tribunal judgment and hence, the transactions are not covered within the purview of MVAT Act, 2002.

Prospective effect

In the application we have prayed for prospective effect to the DDQ, if it is decided against the applicant-company. In this respect, we submit that on apprehension basis, the applicant-company has charged tax in the invoices from the date of filing the application. Prior to the said date, no tax was charged. Further, even in the subsequent period, applicant-company has charged the tax but the licencees have taken objection and not paid the said tax to the applicant-company. Therefore, we request as under;

To the extent applicant-company has not charged the tax or though charged but not paid by the licencees, the prospective effect be granted, so as to protect liability in above circumstances.

In respect of prospective effect, we further submit that it is very much justified on the facts of the case. The application was filed on 4.10.2006 but being decided after long gap. Further, the issue is debatable. The nature of transaction of licensing music rights is required to be decided on the basis of various judgments declared so far. There are contrary judgments and there is no clarity about nature of lease transaction in case of copyright. The debatability involved in the issue is very clear on the face of records of your good office. In case of Phonographic Performance Ltd., your good office has held that the transaction was liable as lease transaction. Subsequently it has been reversed by the Hon'ble Tribunal. The legal position was debatable as per above judgments. This clearly shows that there was uncertainty and confusion.

In this respect, we also bring to your kind notice the following judgments;

Galore Manufacturing (Appeal No. 21 of 1994 dated 24.7.1998)

Prospective effect to DDQ granted as it was decided belatedly.

Deccan Cans & Printers (Appeal No. 164 of 2002 dated 24.4.2006)

Noting the various circumstances about interpretation of liability, prospective effect granted.

In view of above, we request to grant prospective effect and oblige."

A rehearing in the matter was held on dt.13.08.2014 when Sh. C. B. Thakar, Advocate attended the hearing and the submission made earlier as well as the submission dt.28.05.2014 was sought to be reiterated.

The case was again taken up for hearing on dt.05.08.2015 when Sh. C. B. Thakar, Advocate attended and reiterated the submissions made earlier. He requested for prospective effect due to uncertainty of the law and favourable judgments till today. Thereafter, a submission dt.08.08.2015 was tendered on dt.11.08.2015 wherein it is contended thus -

"We refer to above DDQ in which the personal hearing took place on 5.8.2015. We have already given written submission dt.28.5.2014. We add as under;

Recently, Hon'ble Bombay High Court has given judgment in case of Tata Sons Ltd. (W.P.No.2128 of 2012 dt.20.1.2015)(Bom). This judgment was relating to brand name. Hon'ble High Court has held that

in case of brand name, even if it is allowed to be used on non exclusive basis, still there can be leasing liable to sales tax.

However, the above judgment, cannot have effect in case of applicant. Applicant deals in music rights. There are multiple rights like use in pictures, use in commercial premises, right of reproduction and others. Thus, the item in case of appellant is different from item involved in case of TATA Sons Ltd.

When there are multiple rights, the transfer of right to use goods can happen, only when all the rights are transferred to the customer. This legal position is already settled in case of AGS Entertainment Pvt. Ltd. (65 VST 88)(Mad), wherein Hon'ble Madras High Court has dealt with film copy rights, which also contains multiple rights. Hon'ble Madras High Court has held that in case of film copy rights, unless all the rights are transferred, no leasing can take place.

Thus, legal position is that in case of items having multiple rights, the lease transaction can take place only if, all the rights are transferred.

In case of applicant, at the most, right to play the music is given and other rights are not transferred. Therefore, there is no lease transaction as per above judgment.

For the same reason, TATA Sons Ltd., judgment can also not apply.

In view of above, we request to allow the DDQ.

In respect of prospective effect also, we submit that the above legal position shows that there is lot of uncertainty, which is one of the valid reasons for grant of prospective effect. Applicant prays for the same."

04. OBSERVATIONS

I have gone through the facts of the case. To begin with the questions posed for determination are thus :

1. Whether IPRS is dealer under MVAT Act?
2. Whether IPRS is required to get registered under the said Act?
3. Whether the licensing transaction amounts to 'sale' as per above Act?
4. If answers to above questions are in affirmation then the rate of tax on the said transaction.

As regards the first two question about registration, it is seen that the applicant has preferred the present application for determination on dt.29.09.2006 whereas he had voluntarily applied for registration under the MVAT Act,2002 on dt.20.10.2006 and accordingly holds a registration w.e.f dt.20.10.2006. The questions for determination as regards dealer and registration as found in clauses (a) and (b) of sub-section (1) of section 56 of the MVAT Act,2002 are thus -

- (a) any person, society, club or association or any firm or any branch or department of any firm, is a dealer,
- (b) any particular person or dealer is required to be registered

It is seen that the applicant had voluntarily applied for registration. The applicant having already obtained registration under the MVAT Act,2002 gets the status of a 'registered dealer'. Since the applicant has already obtained registration, there arises no occasion to discuss the questions as to whether dealer and whether registration required. I find that a similar situation was discussed in the determination order in the case of Fellowship of the Physically Handicapped (No.DDQ-11-2008/Adm-3/2/B-3 dt.24.12.2008). The observations on the issue were thus :

"It is seen from the record that Fellowship of the Physically Handicapped is registered under the MVAT Act with VAT No. 27080503431V w.e.f. 4.2.2006. Therefore, the question arises as to whether the applicant is entitled to pose a question as to whether they are required to be registered under the Maharashtra Value Added Tax Act, 2002. A similar question has been decided by the larger bench of M.S.T.T. in the case of M/s. Chief Commercial Superintendent, Central Railway and others (Appeal No.2 of 1966) decided on 14.8.1967. In the said question, there were four appellants who raised a common question for determination under section 52(1) of the erstwhile BST Act, 1959 as regards their capacity as 'dealers' after obtaining certificate of registration on their own application. The point referred to the Special Bench was when a person applied for registration and obtained that certificate as a registered dealer, was it open for such person later on to

apply under section 52 of the BST Act, 1959 raising a disputed question for determination that he was not a dealer. It was held by the Tribunal that the question could not be agitated under section 52 of this Act once a person has applied for registration. This was held on the grounds that once a person applies for registration, he knowingly and willingly does so and after obtaining it later on, is fully aware of the consequences of being a 'registered dealer'. Once he is a registered dealer, he sets off a chain of transactions and the people further up on the chain deal with him on the belief that he is a registered dealer. In the present case, the applicant is therefore precluded from raising the question as to whether they ought to be registered under the Value Added Tax Act. Therefore, the question remains a mere academic one."

It is, therefore, seen that there arises no occasion to deliberate on the question nos. 1 and 2 as the same have become infructuous.

I also find that there is a provision under sub-section (5) of section 16 of the MVAT Act, 2002 pertaining to 'Registration' which states thus :

"A person or a dealer who has got himself registered shall be liable to pay tax during the period in which his registration certificate is effective, notwithstanding the fact that subsequently it is found that no registration certificate was necessary in his case."

A provision on similar lines as section 16(5) above existed under the Bombay sales Tax Act, 1959, too. Quoting the said provision, the Hon. MTT in the aforesaid case of Chief Commercial Superintendent, Central Railway and others (Appeal No.2 of 1966) decided on 14.8.1967 observed that the said provision is the remedy for a person who finds that he has been wrongly registered on his own application. It was observed that the provision contemplates that a person who believes that he has got himself wrongly registered as a dealer has the remedy of getting his registration certificate cancelled. The other remedy was pointed out such that the appellant can agitate the question that they are not liable to pay tax on the so-called sales in the assessment proceedings.

Thus, the MVAT Act, 2002 has a provision such that a registered dealer is liable to pay tax till his registration certificate is effective. It is also additionally provided that the registered dealer has to so pay tax even if it is subsequently found that a registration under the MVAT Act, 2002 was not necessary in his case. In view of the above provision, I need not enter into any deliberations as to whether the activities of the applicant are liable to tax under the MVAT Act, 2002 or otherwise.

It is also seen that there is a provision under sub-section (9) of section 3 of the Act pertaining to 'Incidence and levy of tax' which reads thus -

"Any person who is not liable to pay tax under the foregoing, provisions of this section but has been voluntarily registered under the provisions of this Act shall be liable to pay tax from the date of effect of the certificate of registration duly granted to him and accordingly nothing contained in the proviso to sub-section (2) shall apply to him in any year."

The MVAT Act, 2002 prescribes turnover limits and conditions for a person to be registered under the Act. The sub-section (2) as referred to in the above sub-section (9) provides that a deduction from turnover would be granted in respect of the turnover of sales or, as the case may be, purchases upto the turnover which first exceeds the relevant limit specified for obtaining registration. Thus, a dealer is not liable to pay taxes on such turnover. Now, the sub-section (9) provides that a person who has voluntarily opted for registration would not be entitled to such deductions from turnover and thereby exemption from levy of taxes on such turnover. Thus, a voluntarily

registered dealer is placed on a different footing. Further, it is seen that the registration granted to a dealer is cancelled only on account of the following contingencies as provided in the MVAT Act, 2002 :

- (a) any business, in respect of which a certificate of registration has been issued has been discontinued or otherwise disposed of, or has been transferred
- (b) the turnover, of sales or the turnover of purchases of a registered dealer who has become liable to pay tax under section 3 has during any year not exceeded the relevant limit specified in sub-section (4) of section 3
- (c) the turnover of sales of a registered dealer, other than an importer, has during the year 2013-14, not exceeded the limit, specified in sub-section (4) of section 3;
- (d) where the Commissioner is satisfied that any business in respect of which a certificate has been issued under this section has been discontinued or disposed of and the dealer has failed to apply for cancellation of registration
- (e) where the Commissioner is satisfied that any person who has voluntarily got himself registered has not commenced business within six months from the date of registration

It should be noted that the MVAT Act, 2002 provides that the cancellation of a certificate of registration on an application or otherwise shall not affect the liability of the dealer to pay the tax including any penalty, amount forfeited and interest due for any period ending on or before the date of cancellation whether such tax including any penalty, amount forfeited and interest is assessed before the date of cancellation but remains unpaid, or is assessed thereafter. My point in reproducing the provisions is to enable the applicant to appreciate that cancellation of registration is provided in the Act under the specified contingencies only.

Having seen that the applicant is already registered, I refrain from deliberating on the first two questions. I now turn to the third question about whether the activity of the applicant amounts to a 'sale' for the purposes of the MVAT Act, 2002. Though the Act provides that a voluntarily registered dealer is liable to pay tax till his registration certificate is effective, there arises, I feel, no occasion to discuss whether the activities amount to 'sale' and therefore, liable to tax. Nevertheless, I would go ahead to ascertaining the same thus -

The applicant is registered under the Copyright Act, 1957. The certificate of registration states that the applicant is permitted to commence and carry on the copyright business in musical works and any words or any action intended to be sung, spoken or performed with the music. The provisions of the Copyright Act, 1957 could be seen thus :

33. Registration of Copyright Society.-

(1) No person or association of persons shall, after coming into force of the Copyright (Amendment) Act, 1994 commence or, carry on the business of issuing or granting licences in respect of any work in which copyright subsists on respect or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3):

Provided that owner of copyright shall, in his individual capacity, continue to have the right to grant licences in respect of his own works consistent with his obligations as a member of the registered copyright society:

Provided further that the performing rights society functioning in accordance with the provisions of section 33 on the date immediately before the coming into force of the Copyright (Amendment) Act, 1994 shall be deemed to be a copyright society for the purposes of this Chapter and every such society shall get itself registered within a period of one year from the date of commencement of the Copyright (Amendment) Act, 1994.

Thus, the Act says that a copyright society carries on the business of issuing or granting licences in respect of copyrighted works. The owner of the copyright also has the right to issue licences in respect of his own works. Accordingly, the Frequently Asked Questions on the website of the Copyright office of the Government of India clarify thus :

Are individual rights owners are entitled to issue licences and collect royalties who are not members of any copyright society?

As per Section 30 of the Copyright Act, 1957, the owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing signed by him or by his duly authorised agent. Therefore, apart from copyright societies any individual rights owners (e.g. Super Cassette Industries/ Yash Raj Music/ Big Music etc.) are entitled to issue licences and collect royalties. However, the business of issuing or granting license in respect of literary, dramatic, musical and artistic works incorporated in a cinematograph films or sound recordings shall be carried out only through a copyright society duly registered under this Act. This is a kind of compulsory collective licensing for managing of performing rights. Any non-membership in IPRS or individually issuing performing right licences by any music company is illegal as per the Act. As per Section 52 (a) of the Copyright Act, 1957, copyright in a work shall be deemed to be infringed, when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under the Act.

The activity of the applicant Society which is in accordance with the provisions of the Copyright Act has been described in their Memorandum of Association (MOA) thus :

A. The main object to be pursued by the Company on its incorporation are :-

- (1) To exercise and enforce on behalf of Members of the company, being the composers of any musical works or the authors of any literary or dramatics works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (hereinafter called "the owners") all right and remedies of the owners by virtue of the Copyright Act, 1957, or otherwise in respect of any exploitation of their works by public performance, by broadcasting or by causing the same to be transmitted to subscribers to a diffusion service or by recording on mechanical contrivances or records or the publication of such works.

Now, if the Copyright Society is entitled to issue licences, it needs to be authorized in this regard. Accordingly, we find a provision in section 34 of the said Act which provides thus -

34. Administration of rights of owner by copyright society.-

(1) Subject to such conditions as may be prescribed,-

(a) a copyright society may accept from an owner of rights exclusive authorisation to administer any right in any work by issue of licences or collection of licence fees or both; and

(b) an owner of rights shall have the right to withdraw such authorisation without prejudice to the rights of the copyright society under any contract.

(2) It shall be competent for a copyright society to enter into agreement with any foreign society or organisation administering rights corresponding to rights under this Act, to entrust to such foreign society or organisation the administration in any foreign country of rights administered by the said copyright society in India, or for administering in India the rights administered in a foreign country by such foreign society or organisation:

Provided that no such society or organisation shall permit any discrimination in regard to the terms of licence or the distribution of fees collected between rights in Indian and other works.

(3) Subject to such conditions as may be prescribed, a copyright society may-

(i) issue licences under section 30 in respect of any rights under this Act;

(ii) collect fees in pursuance of such licences;

(iii) distribute such fees among owners of rights after making deductions for its own expenses;

(iv) perform any other functions consistent with the provisions of section 35.

Thus, the Copyright Society is authorized by the owners to issue licences in the copyrighted works. Clause (3) of the MOA of the applicant society as reproduced below shows that the applicant is suitably empowered :

B. The objects incidental or ancillary to the attainment of the main objects are

- (2) In the exercise or enforcement of such rights and remedies to make and from time to time rescind, alter or vary any arrangements and agreements with respect to any such exploitation of such works in regard to the mode, periods of extent in for or to which and the terms on which any such exploitation of such works may be made or employed, and to collect and receive and give effectual discharges for all royalties, fees and other monies payable under any such effectual discharges for all royalties, fees and other monies payable under any such agreements or arrangements or otherwise in respect of any such exploitation by all necessary actions or other proceedings, and to recover such royalties, fees and other monies, and to restrain and recover damages for the infringement by means of any such exploitation as aforesaid of the copyrights of such works or any other rights of the owners of the Company on their behalf in respect of such works, and to release, compromise or refer to arbitration any such proceedings or actions or any other disputes or differences in relation to the premises.

- (3) To obtain from the owners such assignments, assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient for enabling the Company to exercise and enforce in its own name or

otherwise all such rights and remedies as aforesaid, and to execute and do all such assurances, agreements and other instruments and acts as may be deemed necessary or expedient for the purpose of the exercise or enforcement by the Company of such rights and remedies as aforesaid.

Sample documents about Assignment of Rights as submitted by the applicant have clauses thus -

- "2. The Assignor hereby assigns to the Society for all parts of the world ALL performing rights and mechanical rights in musical works which now belong to or shall hereafter be acquired by or be or become vested in the Assignor during the continuance of the Assignor's membership of the Society in consideration of the Assignor being assured of his admission to the membership of the Assignee Society for his life time and all such parts or shares (whether limited as to time, place, mode of enjoyment or otherwise) of and all such interests in any performing rights or mechanical rights so as to belong to or shall be so acquired by or become vested in the Assignor (all such premises hereby assigned or expressed or intended to be assigned or expressed are hereinafter collectively referred to as "the rights assigned") TO HOLD the same unto the "Assignee" for its exclusive benefit during the residue of the term for which the rights so assigned shall respectively subsist."
- "And Whereas "The Assignee" has in consideration of the services rendered and/or to be rendered hereinafter by the Assignee, agreed to assign wholly and absolutely the copyright for the public performance and mechanical right of his/her/its existing musical works, arrangements, compositions, transcripts and manuscripts whether published or unpublished including those recorded on the sound track of cinematographic films (as set out in the schedule hereunder and hereinafter referred to as "the said works") in which the copyrights subsists and also all future works which "The Assignee" may hereinafter create or bring into existence by any means whatsoever to the Assignor wholly, and exclusively to the exclusion of all other persons (including himself or herself or itself)."

It can be seen that the applicant is authorized to operate such that it is issuing the licenses under its own name. Let us see as to what is assignment of copyright under the said Act :

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:

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

(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.

19. Mode of assignment.-

(1) 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.

(2) The assignment of copyright in any work shall identify such work, and shall specify the rights assigned and the duration and territorial extent of such assignment.

(3) The assignment of copyright in any work shall also specify the amount of royalty payable, if any, to the author or his legal heirs during the currency of the assignment and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.

(4) Where the assignee does not exercise the rights assigned to him under any of the other subsections of this section within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment.

(5) If the period of assignment is not stated, it shall be deemed to be five years from the date of assignment.

(6) If the territorial extent of assignment of the rights is not specified, it shall be presumed to extend within India.

(7) Nothing in sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) or sub-section (6) shall be applicable to assignments made before the coming into force of the Copyright (Amendment) Act, 1994.

Thus, it can be seen that assignment of copyright is the permission to exercise the rights, as specified, comprised in the copyright. It is further provided that for the rights so assigned, the assignee becomes the owner for the purposes of the Copyright Act. There is consideration flowing in the form of royalty for the use of the rights in the copyrights.

After having seen thus, I would take a look at the details submitted for determination. The bill has the details thus :

Royalty (License) Fees

Royalty for Playing / Performance / Communication of Musical Works to the Public within your / your affiliate's / franchisee's Premises as per details here in

For the Period From 01 Nov 2005 to 31 Oct 2008

Description	Basis	Rate	Qty	Amt (Rs.)	Tot. Amt (Rs.)
Audio Medium - Tape/Radio	Floor Area - Sq. Ft.		1800	2,500.00	
Total					2,500.00
Arrear Amounts					
Start Period	Adv No	Bill Amt	Interest	Penalty	Amount
1-Nov-04	2661	2,500.00	450.00	450.00	0.00
Total Arrears					3,400.00

Some of the clauses of a 'Copyright Music License' executed between the applicant i.e IPRS and M/s. State Bank of India could be seen thus :

1. M/s. State Bank of India (hereinafter called 'The Licensee') hereby agrees with The Indian Performing Right Society Limited (hereinafter called 'The Society') to pay to the Licensor the under mentioned Royalty for the non-exclusive License which the Licensor hereby grants to the Licensee (subject to the Provisions and Conditions hereof) to perform publicly any and every Musical Work (non interactive/interactive), including any words or any action intended to be sung, spoken or performed with the Music.

3. The Royalty initially payable hereunder has been calculated as per the details submitted by the Licensee and verified by the Licensing Inspector to be correct and the particulars by reference to which this Royalty has been calculated is as under :-

Tariff	Description	Quantity	Rate	Total
BO	Audio Medium - Tape/Radio	1,800.00	0.00	2,500.00

8. The License Contract shall continue with the same Conditions (or as revised) as mentioned below from year to year with the revised tariffs until the License Contract is terminated by either party giving to the other party, by Registered Post or Registered Courier, 30 days Notice in writing, subject to Condition 6 hereof and endorsed hereon.

9. The Licensee hereby recognizes that, use by the licensee of works of the Licensor, without a license granted by the licensor, will amount to infringement of the right of the Licensor in such works. The licensee agrees that the subject contract would in no way hamper the right of the licensor to initiate legal proceedings against the licensee on breach of the rights of the licensor.

Conditions

1. This License is granted for Performance of Music within the precincts of the premises hereby Licensed. The License does not extend beyond the Premises so Licensed.

2. If the premises hereby Licensed shall be temporarily or permanently used for any Performance or type of entertainment different from that covered by this License, this License shall not extend to or be deemed to authorize such different Performance or entertainment, unless the appropriate Royalty in respect thereof shall have been paid.

From all above, it can be seen thus -

1. The activity of the applicant, as mentioned in the MOA, is related to exploitation of works of it's members by public performance, by broadcasting or by causing the same to be transmitted to subscribers to a diffusion service or by recording on mechanical contrivances or records or the publication of such works.
2. The applicant has assignments, powers of attorney, etc. to exercise and enforce the above activities in its own name.
3. For the exercise or enforcement of the rights, the applicant has powers to rescind, alter or vary any arrangements and agreements with respect to any such exploitation of such works in regard to the mode, periods of extent in for or to which and the terms on which any such exploitation of such works may be made or employed.
4. The applicant is authorized to collect and receive and give effectual discharges for all royalties, fees and other monies payable under any agreements or arrangements in respect of

any such exploitation and also to recover such royalties, fees and other monies, and to restrain and recover damages for the infringement by means of any such exploitation.

5. The Copyright Act states that the applicant society is engaged in carrying on the business of issuing or granting licences in respect of any work in which copyright subsists.
6. The licenses are the rights in the copyrights and enjoying of the rights by way of the licence granted by the applicant Society treats the person so enjoying the rights in place of the owner of the copyright.
7. Thus, what is being transferred by the applicant Society while acting in the capacity as the owner of the copyright is the right to enjoy the rights in the Copyrights for the specified period as mentioned in the licence.
8. It should be noted that there is transfer of the right to use/enjoy/exploit the rights and not transfer or outright sale of the copyrights.
9. There is consideration for such transfer of enjoyment of copyright and that is the royalty collected from the licencees.
10. The definition of 'sale' under the MVAT Act,2002 is thus -

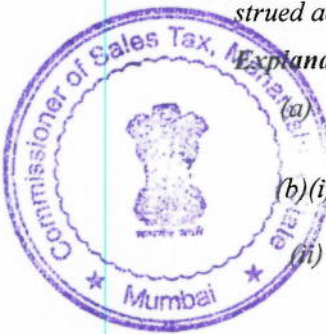
'sale' means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words 'sell', 'buy' and 'purchase', with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation.- For the purposes of this clause,-

- (a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);
- (b)(i) the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;
- (ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a 13[14[works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;]
- (iii) a delivery of goods on hire-purchase or any system of payment by instalments;
- (iv) **the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;**
- (v) the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;
- (vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration;

shall be deemed to be a sale.

Thus, it can be seen that under clause (iv) of the Explanation to the definition of 'sale', we find that *transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration* has been deemed to be a 'sale'. All the ingredients of aforesaid clause (iv) are found fulfilled in the activities carried on by the applicant as follows :



- a. There is transfer of the right to use the copyrights.
 - b. There is valuable consideration in terms of the royalty charges.
11. Copyright is an intangible good. And the MVAT Act,2002, has a specific entry therefor. Schedule entry C-39 of the MVAT Act,2002 attracting tax @5% [4% from 01.04.2005 upto 31.03.2010] reads as "Goods of intangible or incorporeal nature as may be notified, from time to time, by the State Government in the Official Gazette". As can be seen, the entry speaks of a notification. Accordingly by notification dt.01.06.2005, "Copyright" has been described at sr. no.9 of the notification. This sr. no.9 was amended by notification dt.27.04.2011. The description at sr. no.9 as amended w.e.f dt.27.04.2011 reads thus - "Copyrights excluding those for distribution and exhibition of cinematographic films in theatres and cinema halls.".
 12. Thus, it can be seen that the activity of the applicant attracts tax @4/5%.
 13. The applicant has rightly got himself registered under the MVAT Act,2002.
 14. It is further seen that the applicant has been showing turnover liable to tax in the Returns and Audit Form-704 filed for the purposes of the MVAT Act,2002. It could be seen thus -

Particulars	Net Turnover liable to tax	Tax payable (before set-off)
Return (March 2007)	1,51,12,418	6,04,497
Return (March 2008)	2,14,37,737	8,59,397
Return (March 2009)	6,87,50,417	27,53,883
Form 704 (2008-09)	25,85,83,710	1,03,43,348
Form 704 (2009-10)	31,26,45,447	1,25,05,818
Form 704 (2010-11)	41,24,40,519	2,06,22,026
Form 704 (2011-12)	39,64,79,219	1,98,23,961
Form 704 (2012-13)	38,64,76,248	1,93,23,812
Form 704 (2013-14)	42,40,89,040	2,12,04,452
Return (November 2014)	234404490	11,73,000

Having seen thus, I would look at the arguments of the applicant as regards the transaction not being a 'sale' and therefore, not liable to tax under the MVAT Act,2002.

It has been argued that there is no element of business activity and the licensing activity cannot fall in the definition of 'sale'. We have seen above that the Copyright Act itself states that the societies of the nature of the impugned Society carry on the business of issuing or granting licences. We have seen that the activities of the Copyright Societies are such that as being performed by the owners of the copyrights themselves. Further, we have seen that assignment of copyright is the assignment, for a specified period, of the rights involved in the copyrights for the enjoyment of the one being so assigned. We have also seen that the licensee enjoying the copyright is treated as the owner of the copyright. Under the name of the licence, what is being assigned or transferred, for a limited period, are the rights of enjoyment of the copyrights. Therefore, licensing is the transfer of the right of enjoyment of the copyright and is a deemed sale of the transfer of the right to use the copyright.

2. It is argued that the applicant is not a dealer in view of the fact that the applicant is representing individual copyright holders of music who are not dealer by themselves. Now, we

have seen that the applicant Society is acting in the capacity of the owner of the copyright. The definition of dealer under the MVAT Act, 2002 is thus -

"dealer" means any person who, for the purposes of or consequential to his engagement in or, in connection with or incidental to or in the course of, his business buys or sells, goods in the State whether for commission, remuneration or otherwise and includes,-

- (a) *a factor, broker, commission agent, del-credere agent or any other mercantile agent, by whatever name called, who for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of the business, buys or sells any goods on behalf of any principal or principals whether disclosed or not;*
- (b) *an auctioneer who sells or auctions goods whether acting as an agent or otherwise or, who organises the sale of goods or conducts the auction of goods whether or not he has the authority to sell the goods] belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;*
- (c) *a non resident dealer or as the case may be, an agent, residing in the State of a non-resident dealer, who buys or sells goods in the State for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of, the business,*
- (d) *any society, club or other association of persons which buys goods from, or sells goods to, its members;*

Explanation.— For the purposes of this clause, each of the following persons, bodies and entities who sell any goods whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration shall, notwithstanding anything contained in clause (4) or any other provision of this Act, be deemed to be a dealer, namely:-

- (i) *Customs Department of the Government of India administering the Customs Act, 1962 (52 of 1962);*
- (ii) *Departments of Union Government and any Department of any State Government;*
- (iii) *Local authorities;*
- (iv) *Port Trusts;*
- (iv-a) *Public Charitable Trust;*
- (v) *Railway Administration as defined under the Indian Railways Act, 1989 (24 of 1989) and Konkan Railway Corporation Limited;*
- (vi) *Incorporated or unincorporated societies, clubs or other associations of persons;*
- (vii) *Insurance and Financial Corporations, institutions or companies and Banks included in the Second Schedule to the Reserve Bank of India Act 1934 (II of 1934);*
- (viii) *Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950 (LXIV of 1950);*
- (ix) *Shipping and construction companies, Air Transport Companies, Airlines and Advertising Agencies;*
- (x) *any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority;*

Exception I.— An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be deemed to be a dealer within the meaning of this clause.

Exception II.— An educational institution carrying on the activity of manufacturing, buying or selling goods, in the performance of its functions for achieving its objects, shall not be deemed to be a dealer within the meaning of this clause.

Exception III.— A transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988 (5 of 1988), which are used or adopted to be used for hire or reward shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

A look at the above definition would reveal that the applicant gets covered by the definition as a 'dealer' as well as a 'deemed dealer'. The salient features of the impugned case are:

- a. *The Copyright Act terms the activities of issuing or granting of licenses as being an activity in the nature of carrying on of business.*
- b. *The applicant is acting as the owner of the copyright.*
- c. *The transfer of right to exploit the rights in the copyright is for a consideration in the form of royalty.*
- d. *This activity of transfer of right to use the copyright is a 'deemed sale'.*

In view of the above, the applicant qualifies for coverage under the words '*any person who, for the purposes of or consequential to his engagement in or, in connection with or incidental to or in the course*

of, his business buys or sells, goods in the State whether for commission, remuneration or otherwise.....

Further, even if the applicant treats himself as acting only as an agent, then also the definition includes an agent when we see the definition thus - *a factor, broker, commission agent, del-credere agent or any other mercantile agent, by whatever name called, who for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of the business, buys or sells any goods on behalf of any principal or principals whether disclosed or not.*

Further also, if we see clause (vi) of the *Explanation* to the definition of dealer, then one finds that '*Incorporated or unincorporated societies, clubs or other associations of persons*' have been enlisted to as 'deemed dealer'. The present applicant is a Copyright Society registered under the Copyright Act. The *Explanation* itself states that the fiction 'deemed dealers' would operate notwithstanding anything contained in clause (4). Clause (4) is the definition of 'business'. When a deeming fiction is made applicable, one has not to ascertain whether the deemed category carries on any business or not. Therefore, pretexts such as non-business or non-dealer cannot be entertained. '*Incorporated or unincorporated societies*' have been enlisted to be deemed dealers. A perusal of the *Explanation* for 'deemed dealer' reveals that persons, bodies and entities, as have been enumerated thereafter, who sell any goods whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration are deemed to be dealers. Thus, the definition itself specifies that a sale of goods, whether it is by auction or otherwise would render the persons, bodies and entities enlisted in the clauses under the *Explanation* to be a dealer. In the present case, the activity is the transfer of the right to use the copyrights and the same is deemed to be a 'sale' for the purposes of the MVAT Act, 2002. Therefore, by virtue of the deeming fiction, the applicant 'society' engaged in the transaction of right to use the copyrights would be a deemed dealer for the purposes of the MVAT Act, 2002.

3. It is argued that the licences issued are non exclusive licences. In this regard, I would like to invite attention of the applicant to the recent judgment of the Hon. Bombay High Court in *Tata Sons Limited and Another v. State of Maharashtra and Another* (Writ Petition No. 2818 of 2012 with Notice of Motion (L) No. 214 of 2013, decided on January 20, 2015). The very issue of non-exclusive licenses has been dealt with therein. Though concerned with interpretation under the erstwhile Lease Act, the words under consideration were the same as before me, namely '*transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration in the State of Maharashtra.*'. The Lease Act was repealed w.e.f 01.04.2005. The MVAT Act, 2002 came into operation from the aforesaid date. The MVAT Act, 2002 has brought within its fold the repealed Acts such as the Lease Act, Works Contract Act. With regard to the argument tendered therein that there is no exclusive transfer, it was observed thus -

"Upon perusal of the entire Act and reading these provisions together and harmoniously, we are in agreement with Mr. Kumbhakoni that the deal or transaction between the petitioners and the subscribers envisage that a transfer of a right to use the goods and which could be said to be the marks as well. Upon a conjoint reading of the provisions of the Act we are of the opinion that in the case of intangible / incorporeal goods the right to use them is capable of being transferred and if transferred it may be subjected to tax. The Act does not give any indication as is rightly urged before us that the right to use the incorporeal / intangible goods should be exclusively transferred in favour of the transferee. The nature of the transfer or the nomenclature assigned to the act of will therefore not necessarily be decisive. Mr. Chinoy does not dispute that the right to use the goods is incapable of being transferred. The goods could be intangible as well.

We have referred to the clauses in the agreement between the petitioner No.1 and the subscribers in detail only to emphasise that it is not the argument of the petitioners that the right to use is not transferred. However, their argument is that it is not exclusive but conditional. Secondly, it is clear from the clauses of the agreement that the proprietor continues to control even the limited right conferred by the above clauses in favour of the subscribers. We are of the opinion that so long as the agreement transfers the right to use intangible goods which are the trade marks in this case, then, there is no question of the petitioners escaping the consequences of the enactment. The enactment and the definitions which we have referred together with the substantive provisions does not envisage exclusive and unconditional transfer of the above right. The Act has been brought in and with a specific object .

While pressing the argument about non-exclusivity, the Petitioners therein had sought to place reliance on the Hon. Supreme Court decision in BSNL (cited supra) wherein it has been observed thus -

.....
(d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor- this is the necessary concomitant of the plain language of the statute-viz. a "transfer of the right to use", and not merely a licence to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

The Hon. Bombay High Court while deciding this case of Tata Sons Limited (cited supra) explained the context in which the above observations of the Hon. Supreme Court in BSNL (cited supra) were made. The Hon. High Court referred to earlier cases and tried to elucidate and distinguish the Hon. Supreme Court's observations thus -

"50. Para-98 is relied upon by Mr. Chinoy. However, that cannot be read in isolation and out of context. It must be read in the backdrop of the underlying controversy, namely, relationship between a telephone connection service provider and its customer. Such a transaction is essentially of service.

51. It is in relation to such a controversy that the observations, findings and conclusions must be confined. We do not see as to how they can be extended and in the facts and circumstances of the present case to the enactment that we are dealing with. Going by the plain and unambiguous language of the Act of 1985 we cannot read into it the element of exclusivity and a transfer contemplated therein to be unconditional. Therefore the tests in para (d) and (e) cannot be read in the Act of 1985.

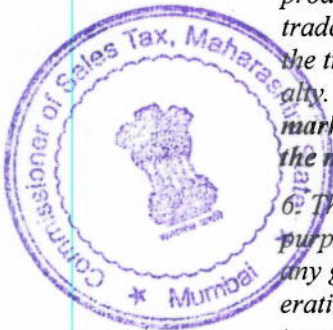
52. We are in agreement with Mr. Kumbhakoni that the judgment of this Court in the case of Commissioner of Sales Tax Vs. Duke and Sons Pvt. Ltd., reported in 1999 (1) Mh.L.J. 26 cannot said to be no longer good law in the light of the judgment of the Hon'ble Supreme Court in BSNL's case. That was the argument canvassed by Mr. Chinoy and his further submission is that relying upon BSNL (supra), the Tribunal rendered its decisions in favour of the franchisees, namely, M/s. Smokin' Joe (supra) and M/s. Diageo India (supra). In M/s. Duke & Sons Pvt. Ltd, similiar controversy fell for consideration and determination of this Court. There, M/s. Dukes was holder of a registered trade mark, namely, Duke's, Mangola, Pineola, Tango. It manufactured concentrates for manufacturing

aerated waters, beverages etc. There were written agreements between the assessee M/s. Dukes and purchasers of the concentrates. The assessee sold the concentrates to the customers for use in manufacturing aerated waters, beverages etc. at their bottling plants. Pertinently such purchasers of the concentrates were permitted to market their beverage by using the trademark of the assessee. The assessee charged royalty for use of the trade mark by the customers. They were styled as Franchise Agreements. **One such Franchise Agreement wherein the assessee permitted the customer M/s. Salstar Foods and Beverages Ltd. to use the trade mark of the assessee on the bottles of the beverage manufactured by them in Maharashtra and to market the same under the trade mark of the assessee was subjected to the tax under the Act of 1985.** There was some doubt and, therefore, an application under Section 52 of the Bombay Sales Act, 1959 was made by the assessee to the Additional Commissioner of Sales Tax. This was for determination of the question, where it was liable to pay tax on the amount of royalty received by it for transfer of trade mark under the Act of 1985. The Additional Commissioner of Sales Tax (Enforcement Branch) by his order dated 3.3.1989 held that by the agreements in question there was a transfer of right to use the trade mark of the assessee to its customers and amounted to sale under Section 2(10) of the Act of 1985. The assessee was thus held to be liable to pay tax. That order was appealed to the Tribunal. The Tribunal set aside the order of the Additional Commissioner and held that the transaction did not amount to transfer of right to use the trade mark by the assessee to its customers and no tax could be levied on the royalty received on said transfer. The Revenue applied for reference of the ground of law arising from this order of the Tribunal. That is how the question of law framed by this Court at para-1 came up for consideration. After noting the rival contentions, the Division Bench held as under :

"5. We have considered the rival submissions in the light of the facts of the case. There is no dispute about the fact that trademarks are goods within the meaning of clause (5) of section 2 of the 1985 Act which defines "goods" to mean all kinds of movable property (not being newspapers, or actionable claims or money, or stocks, shares or securities). This position is also well-settled by the decision of the Supreme Court in *Vikas Sales Corporation vs. Commissioner of Commercial Taxes* where it was observed that even incorporeal rights like trademarks, copy rights, patents and rights in personam capable of transfer or transmission are included in the ambit of "goods". In the instant case, the admitted position is that by the agreement in question, the assessee transferred the right to use its trademarks to M/s Salstar Foods and Beverages Ltd. ("transferee") for consideration. Pursuant thereto, the transferee marketed its products under the trademark of the assessee and for transfer of the right to use the trademark for the purpose of marketing its products under the terms of the agreement, the transferee was liable to pay to the assessee the amount in question by way of royalty. **The question that arises for consideration is whether the right to use the trademark without transfer of any right or interest therein would amount to "sale" within the meaning of clause (10) of section 2 of the 1985 Act.**

6. The Maharashtra Sales Tax on the transfer of the Right to use any Goods for any purpose Act, 1985 was enacted with a view to levying tax on transfer of right to use any goods for any purpose for cash, deferred payment or any other valuable consideration in the State of Maharashtra. Under section 3 of the Act, tax is leviable on the turnover of sales in respect of transfer of right to use any goods. "Turnover of Sales" has been defined in clause (15) of section 2 to mean aggregate of the amounts of sale price received or receivable during the year by a dealer in respect of the transfer of the right to use any goods. "Sale price" has been defined in clause (11) of section 2 to mean the amount of valuable consideration received or receivable for the transfer of the right to use any goods for any purpose. The transfer of right to use any goods for any purpose is regarded as "sale" under the Act as is evident from the definition of "sale" in clause (10) of section 2 of the Act which defines sale to mean transfer of any right to use any goods for any purpose for cash, deferred payment or any other valuable consideration.

From a conjoint reading of the above provisions, it is thus clear that tax is leviable under the Act on the amount received by the assessee for the transfer of the right to use any goods for any purpose. In the instant case, the assessee received a sum of Rs. 1,500/- by way of royalty on the transfer of right to use the trademark of which the assessee is the owner. **The right was transferred by an agreement with the transferee.**



by which the transferee was allowed to use the trademarks of the assessee on payment of consideration by way of royalty at the rate specified therein. It was made clear in the agreement that what was transferred to the transferee was only the right to use the trademark in the manner set out therein and not the right or interest of the assessee in the trademark. The assessee's case is that mere user of the trademark without transfer of any right in the trademark would not amount to transfer of right to use the trademark within the meaning of clause (10) of section 2 of the Act. However, on perusal of the clear provisions of the 1985 Act, we find it difficult to accept the same. This contention, in our opinion, goes counter to the very scheme and object of the 1985 Act. The 1985 Act was enacted for the purpose of levying tax on the transfer of right to use the goods. It is not applicable to transfer of right or title in the goods which may attract the provisions of the Bombay Sales-tax Act. In case of trademark, what is taxable under the 1985 Act is the transfer of right to use the trademark. Admittedly, by agreement between the assessee and M/s Salstar Foods and Beverages Ltd. there was a transfer of right to use the trademark to M/s Salstar Foods and Beverages Ltd. The royalty of Rs. 1,500/- was payable in respect of transfer of the right to use the trademark. Such transfer clearly falls within the provisions of the 1985 Act.

7. "Trade Mark" has been defined in section 2(1)(v) of the Trade and Merchandise Marks Act, 1958 to mean a mark used in relation of goods for the purpose of indicating a connection in the course of trade between the goods and some person having the right, either as a proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person. There is a distinction between transfer of right to use a trademark and assignment of a trademark. "Assignment" of trademark is taken to be a sale or transfer of the trademark by the owner or proprietor thereof to a third party inter vivos. By assignment, the original owner or proprietor of trademark is divested of his right, title or interest therein. He is not so divested by transfer of right to use the same. Licence to use a trademark is thus quite distinct and different from assignment. It is not accompanied by transfer of any right or title in the trademark. The transfer of right to use a trademark falls under the purview of the 1985 Act and not the assignment thereof. The manner of transfer of the right to use the goods to the transferee would depend upon the nature of the goods. For transfer of right to use a trademark, permission in writing as required by law may be enough. In case of tangible property, handing over of the property to the transferee may be essential for the use thereof. All that will depend upon the nature of the goods. Take for instance, transfer of right to use machinery. The right to use the machinery cannot be transferred by transferor to the transferee without transfer of control over it. The case before the Andhra Pradesh High Court in Rashtriya Ispat Nigam Ltd. (supra) was a case of transfer of right to use machinery. It was in that context, the above decision came to be rendered. But the position in case of trademark is different. For transferring the right to use the trademark, it is not necessary to handover the trademark to the transferee or give control or possession of trademark to him. It can be done merely by authorising the transferee to use the same in the manner required by the law as has been done in the present case. The right to use the trademark can be transferred simultaneously to any number of persons. The decision of the Andhra Pradesh High court in Rashtriya Ispat Nigam Ltd. (supra) thus has no application to the transfer of right to use a trademark."



53. In terms of the conclusions reached that there is no dispute that the trade mark is specially included in the schedule of goods to the Act of 1985 and entry No.7 that the question was answered in favour of the Revenue against the assessee. The amount received by the assessee on the transfer of right to use the sale was held as liable to be taxed under the Act of 1985. Thus, the peculiar provision of the Act of 1985, the insertion in the Schedule of intangible and incorporeal goods including Patents and Trade Marks, that the Division Bench concluded as above. Thus, there can be a transfer of the right to use these goods and it need not be exclusive and unconditional. The Transferor may simultaneously use it and during the period of an agreement to transfer the right to use it.

After reproducing the relevant observations from an earlier decision of the very Hon. High Court in *Commissioner of Sales Tax Vs. Duke and Sons Pvt. Ltd. (cited supra)*, it can be seen that the Hon. High Court has categorically observed that -

1. *The transfer of the right to use goods need not be exclusive and unconditional.*
2. *The Transferor may simultaneously transfer the right to use it.*

The Hon. High Court then went on to cite cases wherein the aforesaid decision in *Commissioner of Sales Tax Vs. Duke and Sons Pvt. Ltd. (cited supra)* was referred with authority thus :

"54. This judgment has been quoted with approval by a Division Bench of the Kerala High Court in Kreem Foods Private Limited Vs. State of Kerala reported in (2009) 24 VST 333. There, His Lordship Hon'ble Mr. Justice H.L. Dattu, who was then the Hon'ble Chief Justice of Kerala High Court, spoke for the bench and relied on a decision rendered in Jojo Frozen Foods (P) Ltd v. State of Kerala (S.T.Rev. No.12 of 2006) disposed of on June 23, 2008 and reported in (2009) 24 VST 327 and Mechanical Assembly Systems (India) Pvt. Ltd. vs. State of Kerala reported in (2006) 144 STC 536. The Hon'ble the Chief Justice then quoted with approval in para-11 the conclusions of this Court in M/s.Duke & Sons (supra) and concurred with them. That is how the judgment in the case of Jojo Frozen Foods (supra) would also read.

55. Even in the case of Nutrine Confectionery Co. Pvt. Ltd. Vs. State of Andhra Pradesh reported in [2011] 40 VST 327(AP), the Andhra Pradesh High Court dealt with a case of manufacture and marketing arrangement and the agreements with other companies to allow use of trade mark and logo for agreed royalty. The agreement also provided for obligation of the petitioner to suggest various business modalities and provide formula and recipe. On the question whether the agreement between the petitioner and the company was in respect of transfer of right to use goods taxable under Section 5(e) of the Andhra Pradesh General Sales Tax Act, 1957, the Bench concluded as under:

" The background of the case and the rival submissions throw up the only question for consideration as to whether the agreement between the petitioner and the assignee-company is in respect of the transfer of the right to use the petitioner's trade-mark and logo by the assignee.

There is no dispute that "Nutrine" trademark and "bunny" logo are goods within the meaning of Section 2(h) of the GST Act. There is also no dispute that in the event of the transfer of the right to use trademark and logo by the assignee, the petitioner is liable to pay the tax. The petitioner, however, contends that there is no transfer of the right to use the trade-mark and logo and that the agreement contemplates the petitioner allowing the assignee to use the former's formulas and recipes, make available to data about suppliers of raw materials and the latter agreed not to make any alterations or changes in the formulas. Thus, indisputably the agreement between, the petitioner and the assignee is not only for transfer of right to use the trademark and logo but also obligation of the petitioner to suggest various business modalities and provide formulas and recipes. Can it then be said that there is no transfer of right to use the goods as contemplated under section 5E of the GST Act, which we quote hereunder:

*"5E. Tax on the amount realized in respect of any right to use goods:-
Notwithstanding anything contained in this Act,-*

(a) Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of eight paise on every rupee of the aggregate of such amount realized or realizable 'by him during the year.

(b) The transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in this State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made:



Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than rupees two lakhs."

7. When it is the case of transfer of right to use any goods/section 5E of the GST Act overrides all other provisions of the GST Act. What is taxable is the consideration received by the dealer for "transfer of the right to use any goods for any purpose, whatsoever" to any lessee or licensee for cash, deferred payment or other valuable consideration in the course of the business. The use of the phrase ". . . for any purpose, whatsoever" is the key to understand and resolve the question raised in these revision cases. If the Legislature had intended that the exclusive transfer of right to use the goods alone is taxable without there being the transfer of technical knowhow, manufacturing process, etc., the Legislature must have said so. It is conspicuously absent. Even if there is transfer of right to use goods along with the transfer of other services and facilities even if it is for any limited period, the event is taxable. Either in relation to the taxable event or taxable person, the Legislature does not leave any ambiguity or doubt. There can be transfer of right to use goods under an agreement intended for that purpose or there could be such transfer of the right to use the goods under an agreement for different purposes to be acted upon by the parties as agreed different situations.

8. The relevant clauses to which our attention has been invited in the agreement between the petitioner and the assignee are clauses 2,4,5,7,9 and 10, which read:

"2. The party of the first part shall allow the party of the second part to use the 'Nutrine' trademark and 'bunn/logo on the wrappers, pouches, containers, invoices, letter heads and advertisement materials. It is expressly understood that there will be no exclusive entrustment of the logo and trademark to the party of the second part and the party of the first part will use the same for its own operations.

4. The party of the first part hereby agrees to suggest suitable items of confectionery products keeping in view the facilities available with the second party, provide formulas and recipes for such products and periodically suggest measures for cost reduction.

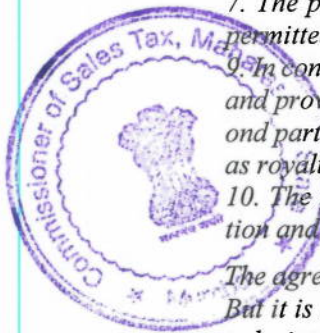
5. The party of the first part will also suggest locations and areas for getting maximum advantage for their products, the method of advertising their products and proper structuring of the prices.

7. The party of the second part shall use the logo and trademark only at the places permitted by the first party.

9. In consideration of the party of the first part permitting usage of logo and trademark and providing various supports and amenities as detailed above, the party of the second part shall pay a sum of Rs.500 (rupees five hundred only) per tonne of production as royalty.

10. The royalty amount mentioned above shall be calculated on the monthly production and shall be paid to the first party within 15 days from and of the month."

The agreement is without any title to give any indication as to nature of the agreement. But it is settled rule of interpretation of documents that every documents or deed has to be interpreted keeping in view the intention of the parties. It is also well-settled that the intention of the parties to a transaction has to be determined with reference to the language and if there is any difficulty or ambiguity in so doing, it is always open to look to attending circumstances. In the absence of any evidence with regard to the circumstances that lead the parties to enter into the transaction or enter into a deed or document, such circumstances can even be inferred from the agreement itself. Clause 2 itself uses the terminology to the effect that, "the party of the first part shall allow the party of the second part to use 'Nutrine' trademark and 'bunny' logo. . .". This is very clear and unambiguous and amounts to transfer of the right to use the trademark and logo. Clauses 4 and 5 are only incidental aspects and no transfer is involved therein. Clause 4 is to the effect that, "party of the first part agrees to suggest suitable items of confectionery products keeping in view the facilities available with the second party, provide formulas and recipes for such products and periodically suggest measures for cost reduction". Clause 5 also speaks of the petitioner making suggestions regarding locations for getting maximum advantage for those products.



These are only add on services offered by the petitioner and they do not amount to transfer of trademark nor they are different services. When one understands the brand value of the trademark things would be clear. More often than not the brand value is result of the trademark of the company itself. By allowing the assignee to use trademark and logo, the petitioner only ensuring that brand value of "Nutrine" to get a competitive edge in the market. The facilitating use of technical know-how, recipes and formulas are, indeed related to the brand value and, therefore, the petitioner undertook the obligation of providing these services. This is made clear by reference to clause 9 which says that the consideration of payment of royalty is only for permitting the assignee to use the trademark and logo. Therefore the agreement in question is certainly one evidencing the transaction of transfer of the right to use Nutrine trademark and bunny logo.

10. This court, after giving anxious consideration, is of the opinion that even if the consideration cannot be separated nor is it discernible as to which part of the consideration for which service, it does not make any difference nor the obligation undertaken by the petitioner to provide supporting services dilute clause 2 which speaks of transfer of right to use the trademark and logo. None of the decisions relied on by the counsel would support the petitioner's contention. It is well-settled that the nature of transfer of right to use on the plain language of section 5E of the GST Act is immaterial.

The transfer of right to use any goods "for any purpose whatsoever" falls within the ambit of section 5E of the GST Act and merely because the agreement speaks of other aspects in addition to creating a right in the assignee to use the trademark and logo does not make any difference especially when the goods so transferred are incorporeal or intangible in character like copy right, patent, trademark) etc."

56. Pertinently in paras-15 & 16, a reference was made to the judgment of the Hon'ble Supreme Court in the case of BSNL (supra) and the same was distinguished. The Bench concluded that the consideration received as royalty for allowing use of the trade mark and logo is covered by the A.P. enactment. The royalty is realized in respect of transfer of right to use goods and is thus taxable.

57. Thus, far from the judgment of the Division Bench of this Court in M/s. Dukes and Sons (supra) being no longer a good law, that judgment and the ratio therein has been consistently referred and quoted with approval by the Kerala High Court and Andhra Pradesh High Court. This was subsequent to the judgment of the Hon'ble Supreme Court in BSNL (supra). With respect, we concur with all the aforesaid decisions and rulings.

58. We are of the opinion that the Tribunal did not act perversely or committed an error apparent on the face of record in rejecting the petitioner's appeals. May be the Tribunal could have rendered a detailed finding and conclusion. However, upon perusal of the order passed by the Tribunal we find that it referred to the facts. It has also adverted to the contentions of the parties. It also referred to its own conclusions rendered in the case of M/s. Smokin Joe etc. However, it concludes that the facts and circumstances in the present case are not identical to the cases dealt with by it and of the above franchisees. We do not express any opinion as to whether the Tribunal's conclusions in the case of M/s. Smokin' Joe (supra) and M/s. Diageo India (supra) are accurate or correct. We are informed that separate proceedings in that regard are pending in this Court. However, the Tribunal did not err in holding that the cases which have been dealt with by it including the Supreme Court judgment in the case of BSNL (supra) are on distinct facts.

59. Once such conclusion is reached by us, then, strictly it is not necessary to deal with the judgments on the rule of precedents and propriety of disregarding co-ordinate bench decisions. This rule is reiterated by this Court and equally by the Hon'ble Supreme Court. In fact, this Court has followed several such judgments of the Hon'ble Supreme Court. There cannot be any dispute or quarrel about this principle but its application would depend on the given facts and circumstances. When a coordinate Bench decision can be distinguished and such distinction is founded on facts and circumstances which are peculiar to the other case, that course is equally permissible in law. We do not see how the tribunal can be faulted for not applying and following the rule of consistency or judicial discipline. In our view, reliance therefore placed on the judgments laying down and reiterating the above principle is entirely misplaced.

60. As a result of the above discussion, we do not find any merit in this Petition."

As observed by the Hon. Bombay High Court in the above judgment of Tata Sons Limited (cited supra) in the para no.56 as reproduced at the start of this page, the Hon. Andhra Pradesh High Court in Nutrine Confectionery Co. Pvt. Ltd. Vs. State of Andhra Pradesh reported in (cited supra) distinguished the observations of the Hon. Supreme Court in BSNL (cited supra) with regard to the concept of 'exclusivity' thus :

"Bharat Sanchar Nigam Ltd. v. Union of India [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 3 SCC 1, inter alia, considered the question whether there is any transfer of right to use any goods by providing access or telephone connection by the telephone service provider to the subscriber and whether such transaction is a composite contract for service and sale. Five questions were considered and the conclusions by the Division Bench of the Supreme Court are as follows :

<i>"Question</i>	<i>Answer</i>
<i>(A) What are 'goods' in telecommunication for the purposes of article 366(29A)(d) ?</i>	<i>(A) Goods do not include electromagnetic waves or radio frequencies for the purpose of article 366(29A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the assessing authorities.</i>
<i>(B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber ?</i>	<i>(B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.</i>
<i>(C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale ? If so, is it possible for the States to tax the sale element ?</i>	<i>(C) The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.</i>
<i>(D) If the providing of a telephone connection involves sale is such sale an inter-State one ?</i>	<i>(D) The issue is left unanswered.</i>
<i>(E) Would the 'aspect theory' be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax ?</i>	<i>(E) The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service."</i>

The law declared by the Supreme Court while dealing with the questions B and C as above is relied on by the petitioner. According to the counsel, when there is a discernible sale only, to the extent of such sale, the event is taxable and if there is a composite contract of sale, it cannot be taxed. We have perused the agreement between the petitioner and the assignee and are convinced that transfer of right to use "Nutrine" trademark and "bunny" logo is clearly discernible, which is dominant purpose and notwithstanding the provision of various supports and amenities, the transaction does not cease to be a sale. The counsel relies on para 98 of STC from the concurring judgment and contends that when there is no exclusion of the petitioner in the use of the goods, there is no transaction for the transfer of right to use the goods. We are afraid, we cannot accept the submission.

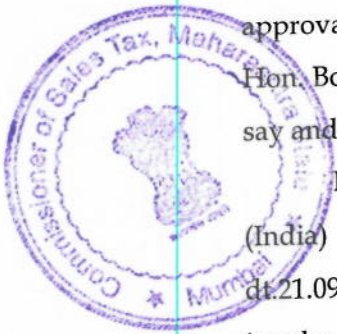
Bharat Sanchar Nigam Ltd. [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 3 SCC 1 was dealing with a case of mobile telephone connections. It is not a case of assignment/transfer of a trademark or a logo. The contract for providing a mobile connection invariably contains clause that the licensee shall use the mobile connection exclusively for himself or herself and nobody else would use. In the case of a trademark as provided in Chapter V (sections 37 to 45) of the Trade Marks Act, 1999, the same can be used by the assignee without any exclusive right. A reference to section 41 of the Trade Marks Act makes it very clear. The proprietor of a trademark can always assign a registered or unregistered trademark for exclusive use or a limited use to different persons at the same time under licence. Indisputably the petitioner retained the right to use the "Nutrine" trademark and "bunny" logo for its own operations. This itself does not remove the transaction under the agreement outside the purview of section 5E. As rightly pointed out by the special counsel, a trademark or logo which is incorporeal or intangible, can always be assigned by the proprietor while retaining the right to use for itself. Furthermore, as pointed by majority in Bharat Sanchar Nigam Ltd. [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 3 SCC 1 the determination whether a transaction amounts to transfer of right to use the goods, "... would depend ultimately upon the intention of the parties" and therefore, by reading one clause of the agreement, the intention cannot be gathered. On reading of the agreement between the petitioner and the assignee, the learned Tribunal correctly came to the conclusion that the consideration received as royalty for allowing the assignee the use of trademark and logo, is realized in respect of the transfer of the right to use the goods. This does not call for any interference."

Thus, we find that both the Hon. Bombay High Court as well as Hon. Andhra Pradesh High Court have in very unambiguous words held that the observations of the Hon. Supreme Court in BSNL (cited supra) are distinguishable and further that a transfer to multiple parties could be had. Now, the applicant has argued that the decision in Tata Sons would not be applicable to their case as the same pertained to Trade Marks whereas the impugned proceedings relate to Copyright. With regard to this argument, I have to state that from the provisions of the Copyright Act as reproduced above, this argument should not sustain. The transfer of the right to use is the transfer of the rights to enjoy the rights in the copyrights. It can be simultaneously transferred to a number of transferees which in any way does not hamper the right of each such transferee to enjoy the right to the exclusion of the others.

The applicant has sought to place reliance on the decision in AGS Entertainment (cited supra). However, I find that the same would not be useful as the Hon. Madras High Court has very pointedly stated the obvious that *in the case of Sales Tax Act, there would be "transfer of right to use the goods" whereas under the Service Tax Act what is levied is temporary transfer/enjoyment of the goods. The pith and substance of both enactments are totally different. "Temporary transfer" or "permitting the use or enjoyment of the copyright" is not within the State's exclusive power under Entry 54 of List II.* Thus, with regard to Service Tax, it was observed that *the said levy is not a levy of tax on the "transfer of the right to use the goods", but, on the service provided or to be provided for transferring temporarily or permitting the use or enjoyment of any copyright, except the rights covered under section 13(1)(a) (original literary, dramatic, musical and artistic works) of the Copyright Act.*

The Hon. Bombay High Court had to go to the extent of stating that the law in this regard is well settled such that the judgment of the Division Bench of the Hon. Bombay High Court in M/s. Dukes and Sons (supra) and the ratio therein has been consistently referred and quoted with approval by the Hon. Kerala High Court and the Hon. Andhra Pradesh High Court. In view of the Hon. Bombay High Court having dealt with the issue so very extensively, there remains little to say and argue.

Even the Hon. MTT in the recent decision in the case of M/s. Sony Music Entertainment (India) Pvt. Ltd. v/s. The State of Maharashtra (S.A Nos. 323 to 327 of 2013 decided on dt.21.09.2015) has followed the above judgment of the Hon. Bombay High Court. The transactions involved were of the nature as of granting public performance rights, assigning copyrights for publishing purpose and mechanical rights in existing works/besides composition in which the copyright subsides, administration of mechanical rights, musical rights, sound recording and cinematographic film, etc. In consideration of the rights, the assignee society (M/s. PPL, M/s. IPRS) shall pay from time to time such sums of money out of the means collected by the society in respect of the exercise of the rights in all the works of its members. Following the above judgment of the Hon. Bombay High Court, it was held that the right to use the musical works and the cinemato-



graphic rights as well as copyright work assigned by the appellant to the assignee and in pursuance of the said transactions, the appellant company to receive royalty as well as the amount of money collected by the societies for the execution of such right, despite some rights being retained by the appellant, are transactions covered by the provisions of the right to use any goods for any purposes Act (Lease Act). The Lease Act has been repealed w.e.f 01.04.2005. However, the incidence of tax therein has been incorporated under the MVAT Act,2002. It thus can be seen that the transactions of the nature as posed before me are exigible to levy of tax.

05. PROSPECTIVE EFFECT

The applicant has prayed for prospective effect, if they are held as liable to any tax. To decide any request for prospective effect, what is to be seen is whether there were any ambiguous provisions as also statutory misguidance. Such are not the circumstances of the instant case. The provisions in the Copyright Act were such that the applicant Societies were considered as carrying on the business of issuing/granting licences. Further, the licences were the transfer of the right to exploit or enjoy the rights in the copyrights. We see that the MVAT Act,2002 provided for levy of tax on the transfer of the right to use goods. And as regards case law, then we see that the Hon. Bombay High Court in the decision in Commissioner of Sales Tax Vs. Duke and Sons Pvt. Ltd. on dt.22.09.1998 had observed that "*The right to use the trademark can be transferred simultaneously to any number of persons.*". Thus, when there is a decision of our very own High Court, a case for ambiguity of the law rests feebly. Further, we see that the applicant has, in the year 2006, voluntarily obtained registration under the MVAT Act,2002 and we have seen the provisions in respect of a voluntarily registered dealer. The reliance on cases in support of prospective effect not found proper in view of the facts in the instant case being different. The applicant has been rightly paying taxes payable (before adjustment of set-off) as below :

Particulars	Net Turnover liable to tax	Tax payable (before set-off)
Return (March 2007)	1,51,12,418	6,04,497
Return (March 2008)	2,14,37,737	8,59,397
Return (March 2009)	6,87,50,417	27,53,883
Form 704 (2008-09)	25,85,83,710	1,03,43,348
Form 704 (2009-10)	31,26,45,447	1,25,05,818
Form 704 (2010-11)	41,24,40,519	2,06,22,026
Form 704 (2011-12)	39,64,79,219	1,98,23,961
Form 704 (2012-13)	38,64,76,248	1,93,23,812
Form 704 (2013-14)	42,40,89,040	2,12,04,452

With such tax liabilities as above, the case of the applicant stands on a different footing. There was no fluid position of law as has been observed to be in the decision in M/s. Deccan Cans & Printers (cited supra) as the Hon. Bombay High Court had way back in 1998 clarified that the transfer of right to use could be simultaneously transferred to different persons. Further, the provisions of the Copyright Act were available to infer that the applicant was carrying on business. In the circumstances, no case for grant of prospective effect is found justified.

06. In view of the detailed deliberations, I pass an order thus -

ORDER

(under sections 56 (1) (a), (b), (d) (e) and (2) of Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2006/Adm-5/82/B- 1

Mumbai, dt. 4/2/2016

- The questions posed for determination are determined thus :

1	<i>Whether IPRS is dealer under MVAT Act?</i>	<i>The applicant having voluntarily obtained registration under the Maharashtra Value Added Tax Act, 2002, the question becomes infructuous.</i>
2	<i>Whether IPRS is required to get registered under the said Act?</i>	<i>- do -</i>
3	<i>Whether the licensing transaction amounts to 'sale' as per above Act?</i>	<i>The transaction of granting license is a transfer of the right to use/enjoy/exploit the rights contained in the copyrights. It is a 'deemed sale' for the purposes of the Maharashtra Value Added Tax Act, 2002.</i>
4	<i>If answers to above questions are in affirmation then the rate of tax on the said transaction</i>	<i>The rate of tax on the transaction is 4% from 01.04.2005 to 31.03.2010 and 5% from 01.04.2010 onwards.</i>

- For reasons as discussed in the body of the order, the request for prospective effect is rejected.




(RAJIV JALOTA)

**COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI**