आयकर अपीलीय अधिकरण
दिल्ली पीठ "डी", दिल्ली
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एम. बालगणेश, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

आअसं.1803/दिल्ली/2025(नि.व. 2018-19)
ITA No. 1803/DEL/2025 (A.Ys. 2018-19)

Thaicom Public Company Ltd.,
(Earlier Known as Shin Satellite Public Company Ltd.),
c/o Mohinder Puri & Co.
1A-D, Vandhna, 11 Tolstoy Marg, New Delhi 110001
PAN No: AAGCS-4481-E ..... अपीलार्थी/Appellant

बनाम Vs.

Assistant Commissioner of Income Tax,
Circle 3(1)(1), International Taxation,
New Delhi 11002 ..... प्रतिवादी/Respondent

Assessee by : Shri Ajay Vohra, Sr. Advocate with
S/Shri Jatinder Singh & Akshay Mathur,
Chartered Accountants
Department by : Shri M.S Nethrapal, CIT-DR (Through VC)

सुनवाई की तिथि/ Date of hearing : 24/11/2025
घोषणा की तिथि/ Date of pronouncement: : 28/11/2025

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the Assessment Order passed u/s. 147 r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 30.01.2025, for Assessment Year 2018-19.

2. Shri Ajay Vohra, Sr. Advocate, appearing on behalf of the assessee submits that the assessee in ground no. 1 to 3 of appeal has assailed validity of jurisdiction u/s.147

of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for reopening of assessment, for AY 2018-19.

3. Shri Ajay Vohra, stated that notice u/s. 148A(b) of the Act for the impugned assessment year was issued on 31.03.2022. The reason for reopening of assessment was that the assessee has not offered to tax income from Indian customers for providing digital broadcast services through its transponders. The Assessing Officer (AO) held that, such income is taxable as Royalty under Explanation 6 to section 9(1)(vi) of the Act and under Article 12 of the India-Thailand Double Tax Avoidance Agreement (DTAA). The assessee filed reply to the said notice on 07.04.2022 explaining that assessee has no Permanent Establishment (PE) in India, hence, such receipts are not taxable in India as per Article 7 of India-Thailand DTAA. The assessee further explained that this issue is recurring and in the preceding assessment years, the Hon'ble Delhi High Court in assessee's own case has held that the receipts of the assessee do not constitute Royalty. Even, after amendment to section 9(1)(vi) of the Act made by the Finance Act, 2012 are considered, still such receipts are not taxable in India. The ld. Counsel furnished copy of the High Court order in ITA No. 500/2012 titled Director of Income Tax vs. Shin Satellite Public Company Ltd. (Erstwhile name of the assessee) decided on 08.02.2016. The AO rejected the objections of the assessee vide order dated 11.04.2022 passed u/s.148A(d) of the Act. However, the AO in the said order noted that the addition has been made on the recurring issue and also the fact that the issue has been decided in favour of the assessee by the Hon'ble Delhi High Court in assessee's own case. The only reason for rejecting assessee's objections were that the Revenue has filed appeal against the order of Delhi High Court and the same is pending before the Hon'ble Supreme Court of India. The ld. Counsel submits that since the issue of

taxability of receipts in lieu of use of broadcasting services through assessee's transponders was decided in favour of the assessee, the Hon'ble High Court holding that the receipts are not taxable in India, the assessee had no reasons to offer such receipts in the impugned assessment year to tax. Further, the said judgment of Hon'ble Delhi High Court was later approved by the Hon'ble Supreme Court of India in the case of *Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT, 432 ITR 471 (SC).* In the backdrop of facts narrated above, the ld. Counsel for the assessee asserted that reopening of assessment is bad in law as the very basis on which reopening is initiated has already been decided by the Hon'ble High Court in favour of the assessee. To support his arguments, the ld. Counsel placed reliance on the following decisions:

- *Vaish Associates Advocates vs. ACIT, WPC No.3072/2015 decided by Hob'ble Delhi High Court on 14.01.2016; &*
- *Sahkari Khand Udyog Mandal Ltd. vs. ACIT, in Special Civil Application no. 3955/2014 decided by Hon'ble Gujarat High Court on 31.03.2014.*

4. Per Contra, Shri M.S Nethrapal representing the department strongly supported findings of the AO and the Dispute Resolution Panel (DRP) on the issue of validity of reopening of assessment. The ld. DR submits that no assessment u/s.143(3) of the Act was made in the impugned assessment year in the case of the assessee. It is a settled legal position that where no assessment u/s.143(3) of the Act is made, the AO can reopen the assessment, even in the absence of the any tangible material. To buttress his arguments, the ld. DR placed reliance on the decision in the case of *Ernst & Young US LLP vs. ACIT, reported as 146 taxmann.com 64 (SC).*

5. Both sides heard, orders of the authorities below examined and the decisions on which rival sides have placed reliance to reinforce their respective arguments consider.

6. The assessee is a company incorporated in Thailand and is primarily engaged in the business of providing transponder services through its satellites in various countries including India. Undisputedly, the assessee is carrying out the aforesaid business of providing transponder services for the past several years. The issue, whether the receipts on providing transponder services are in the nature of Royalty and are taxable in India under the provisions of section 9(1)(vi) of the Act and Article 12 of India-Thailand DTAA is perennial. The AO has been consistently holding that, such receipts are in the nature of royalty and the assessee is having PE in India, therefore, such receipts are taxable in India. In appeal by the assessee, the Tribunal decided the issue in favour of assessee. The issue travelled to the Hon'ble Delhi High Court in appeal by the Department. The substantial questions of law for consideration of the Hon'ble High Court in the said appeal were:

> *"(1) Whether the receipts of the assessee's earned from providing data transmission services, fall within the term royalty under the Income Tax Act, 1961, and;*
>
> *(2) If the answer to the first is in the affirmative, whether the assessee's would be eligible for the benefit under the relevant Double Tax Avoidance Agreements."*

7. The Hon'ble High Court after considering the amendment to section 9(1)(vi) of the Act by the Finance Act, 2012 held:-

> *"38. The circumstances in this case could very well go to show that the amendment was no more than an exercise in undoing an interpretation of the court which removed income from data transmission services from taxability under Section 9(1)(vi). It would also be difficult, if not impossible to argue, that inclusion of a certain specific category of services or payments within the ambit of a definition alludes not to an attempt to illuminate or clarify a perceived*

ambiguity or obscurity as to interpretation of the definition itself, but towards enlarging its scope. Predicated upon this, the retrospectivity of the amendment could well be a contentious issue. Be that as it may, this Court is disinclined to conclusively determine or record a finding as to whether the amendment to 9(1)(vi) is indeed merely clarificatory as the Revenue suggests it is, or prospective, given what its nature may truly be. The issue of taxability of the income of the assessees in this case may be resolved without redressal of the above question purely because the assessee has not pressed this line of arguments before the court and has instead stated that even if it were to be assumed that the contention of the Revenue is correct, the ultimate taxability of this income shall rest on the interpretation of the terms of the DTAAs. Learned Counsel for the assessee has therefore contended that even if the first question is answered in favour of the Revenue, the income shall nevertheless escape the Act by reason of the DTAA. The court therefore proceeds with the assumption that the amendment is retrospective and the income is taxable under the Act."

8. The Hon'ble High Court answered question no. 2 in favour of the assessee holding that the receipts are not taxable in India in view of the provisions of Article 12 of India-Thailand DTAA. The relevant excerpts of the order of Hon'ble High Court are as under:-

"39. It is now essential to decide the second question i.e. whether the assessees in the present case will obtain any relief from the provisions of the DTAAs. Under Article 12 of the Double Tax Avoidance Agreements, the general rule states that whereas the State of Residence shall have the primary right to tax royalties, the Source State shall concurrently have the right to tax the income, to the extent of 15% of the total income. Before the amendment brought about by the Finance Act of 2012, the definition of royalty under the Act and the DTAAs were treated as pari materia. The definitions are reproduced below:

Article 12(3), Indo Thai Double Tax Avoidance Agreement:

"3. The term "royalties" as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."

Article 12(4), Indo Netherlands Double Tax Avoidance Agreement

"4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience."

Section 9(1)(vi), Explanation 2, Income Tax Act, 1961

"(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property"

40. In Asia Satellite 37the Court, while interpreting the definition of royalty under the Act, placed reliance on the definition in the OECD Model Convention. Similar cases, before the Tax Tribunals through the nation, even while disagreeing on the ultimate import of the definition of the word royalty in the context of data transmission services, systematically and without exception, have treated the two definitions as pari materia. This Court cannot take a different view, nor is inclined to disagree with this approach for it is imperative that definitions that are similarly worded be interpreted similarly in order to avoid incongruity between the two. This is, of course, unless law mandates that they be treated differently. The Finance Act of 2012 has now, as observed earlier, introduced Explanations 4, 5, and 6 to the Section 9(1)(vi). The question is therefore, whether in an attempt to interpret the two definitions uniformly, i.e. the domestic definition and the treaty definition, the amendments will have to be read into the treaty as well. In essence, will the interpretation given to the DTAAs fluctuate with successive Finance Act amendments, whether retrospective or prospective? The Revenue argues that it must, while the Assessees argue to the contrary. This Court is inclined to uphold the contention of the latter.

41. This Court is of the view that no amendment to the Act, whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an international treaty. In other words, a clarificatory or declaratory amendment, much less one which may seek to overcome an unwelcome judicial interpretation of law, cannot be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment. In the context of international law, while not every attempt to subvert the obligations under the treaty is a breach, it is nevertheless a failure to give effect to the intended trajectory of the treaty. Employing interpretive amendments in domestic law as a means to imply contoured effects in the enforcement of treaties is one such attempt, which falls just short of a breach, but is nevertheless, in the opinion of this Court, indefensible."

9. The Hon'ble High Court while answering the larger question of impact of amended on the provisions of the DTAA, decided substantive issue in the appeal in favour of the assessee and against the Department. Once, the issues have been decided in favour of the assessee by the Hon'ble High Court, the assessee had no reason to offer receipts from use of transponders in India.

10. A perusal of reply of the assessee to show cause notice issued u/s.148A(b) of the Act (at page no. 35 to 39 of the paper book) would show that the assessee has brought to the notice of AO, the fact of the decision of Hon'ble High Court in assessee's own case in preceding assessment years. The AO in order passed u/s. 148A(d) of the Act has recorded, "it was seen that additions had been made on recurring issues". Thus, the AO was well aware that income from Indian customers for providing digital broadcast services through transponders is a legacy issue. The AO further observed in para 3 of his order that income from Indian customers for providing digital broadcast services has been held to be not taxable in India by the Hon'ble Delhi High Court in case of the assessee. Yet, the AO proceeded with reopening of assessment merely for the reason that now the issue is under consideration before the Hon'ble Supreme Court of India. The assessment cannot be allowed to reopen for the reason that the issue is pending before Hon'ble Supreme Court of India specially, when the issue has been decided in the past in favour of the assessee by the Hon'ble High Court. Once, the issue has been decided by the Hon'ble High Court in favour of the assessee, on the same very issue assessment for the subsequent assessment years cannot be reopened. The Hon'ble Delhi High Court in the case of Vaish Associates Advocates vs. ACIT (supra) while dealing with somewhat similar situation held as under:-

"4. The order passed by the Assessing Officer ('AO') in respect of the Petitioner for AY 2009-10 on 30th December 2011, disallowing the remuneration paid to the partners on the ground that it was not in terms of Section 40 (b) (v) of the Act was carried in appeal by the Petitioner to the Commissioner of Income Tax (Appeals) who by an order dated 4th January 2013 upheld the order of the AO. The further appeal by the Assessee being ITA No. 1382/Del/2012 was allowed by the Income Tax Appellate Tribunal ('ITAT') by order dated 5th July 2013. The ITAT interpreted Clause 6(a) of the partnership deed dated 22nd June 2008 and held that allocable profits would be "total surplus/book profit prior to calculation of partner's remuneration". The disallowance by the AO was held to be bad in law.

5. The aforementioned order of the ITAT was subject matter of the Revenue's appeal before this Court being ITA No. 50 of 2014. By its decision dated 11th August 2015 in Commissioner of Income Tax-III v. Vaish Associates [2015] 63 taxmann.com 90 (Del.) the Court upheld the order of the ITAT overturning the order of the CIT (A) and inter alia observed as under:

> *"8..... Clause 6(a) of the partnership deed dated 20th June 2008 clearly indicates the methodology and the manner of computing the remuneration of partners. The remuneration of the partners has been computed in terms thereof. The Court additionally notes that under Section 28(v) of the Act, any salary or remuneration by whatever name called received by partners of a firm would be chargeable to tax under the head profits and gains of business or profession. The proviso to Section 28 (v) states that where such salary has been allowed to be deducted under Section 40(b)(v), the income shall be adjusted to the extent of the amount not so allowed to be deducted. Further Section 155 (1A) of the Act states that where in respect of a completed assessment of a partner in a firm, it is found on the assessment or reassessment of the firm that any remuneration to any partner is not deductible under Section 40(b), the AO may amend the order of the assessment of the partner with a view to adjusting the income of the partner to the extent of the amount not so deductible. A conspectus of these provisions makes the opinion the ITAT consistent with the legal position.*
>
> *9. Consequently, the Court finds no legal infirmity in the interpretation placed by the ITAT on Clause 6(a) of the partnership deed dated 22nd June 2008 to conclude that the salary paid to the partners was in accordance with Section 40(b)(v) of the Act and ought not to have been disallowed. Consequently, as regards this issue, no substantial question of law arises."*

6. It is, therefore, seen that the very basis for re-opening of the assessment for the earlier AYs i.e. 2007-08 and 2008-09 has been rendered non-existent as a result of the above order of this Court interpreting clause 6 (a) of the partnership deed in question.

7. Consequently, the re-opening of the assessment for the aforementioned AYs 2007-08 and 2008-09 on the above basis cannot be sustained in law."

11. In light of the facts discussed above and the decisions referred, we are of considered view that the foundation for reopening the assessment is itself faulty, hence, the notice u/s.148 of the Act is bad in law. Consequently, the subsequent proceedings arising from invalid notice are vitiated. The assessee succeeds on ground no. 1 to 3 of appeal.

12. The decision on which the ld. DR has placed reliance does not in any manner support the Department. The said judgment is altogether on a different issue and has no application on the issue in hand.

13. Since, the assessee gets relief on the jurisdictional issue, the grounds raised by the assessee assailing additions on merit have become academic. Thus, they are not deliberated at this stage.

14. In the result, impugned order is quashed and appeal of the assessee is allowed.

Order pronounced in the open court on Friday the 28th day of November, 2025.

Sd/-	Sd/-
(M. BALAGANESH)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

दिल्ली/Delhi, दिनांक/Dated 28/11/2025

NV/-

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., दिल्ली /DR, ITAT, दिल्ली
5. गार्ड फाइल/Guard file.

BY ORDER,

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(Asstt. Registrar) ITAT, DELHI