

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ “डी”, नई दिल्ली में

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH ‘D’, NEW DELHI**

सुश्री सुषमा चावला, उपाध्यक्ष एवं श्री प्रशांत महर्षि, लेखा सदस्य के समक्ष  
**BEFORE MS. SUSHMA CHOWLA, V.P & SHRI PRASHANT MAHARISHI, AM**

आयकर अपील सं. / ITA No.4523/De1/2016

निर्धारण वर्ष / Assessment Year 2012-13

The DCIT (International taxation),  
Circle-3(1)(1), Room No.419,  
E-2, Dr.S.P.Mukherjee Civic Centre,  
J.L.N.Marg, New Delhi.

.....अपीलार्थी / Appellant

vs

Thaicom Public Co. Ltd.,  
(Earlier known as Shin Satellite Public Co.Ltd.),  
C/o-Mohinder Puri & Co., CAs, 1A, Vandana,  
11, Tolstoy Marg, New Delhi-110001.  
PAN-AAGCS4481E

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Sh. Satpal Gulati, CIT DR

प्रत्यर्थी की ओर से / Respondent by : None

सुनवाई की तारीख / Date of Hearing : 18.03.2020	घोषणा की तारीख / Date of Pronouncement: 14.05.2020
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**आदेश / ORDER**

**PER SUSHMA CHOWLA,VP**

The present appeal filed by assessee is against order of CIT(A)-43, New Delhi dated 21.06.2016 relating to assessment year 2012-13 against order passed under section 144C(1) r.w.s 143(3) of the Income-tax Act, 1961 (in short ‘the Act’).

2. The Revenue has raised following grounds of appeal:-

(i) *“Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the transponder charges received by the assessee are not taxable as Royalty ignoring the fact that the decision of the Delhi High Court in ' assessee’s own case has not been accepted by the Department and an SLP has been filed and thus the issue has not attained its finality.*

(ii) *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in holding that the payment for provision of transponder capacity is not in the nature of Royalty under the provisions of the I.T. Act as well as under the corresponding provisions of the DTAA between India and Thailand.*

(iii) *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in ignoring the fact that the given payments fall within the purview of Equipment Royalty as well as Process Royalty under section 9(1 )(vi) of the Act.*

(iv) *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in not appreciating the fact that by way of insertion of Explanation 6 to section 9(1 )(vi) of the IT Act, the meaning of the term ‘process’ has only been clarified without amending the definition of ‘royalty’ in any manner.*

(v) *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in not appreciating the fact that the expression ‘process’ is not defined in the India - Thailand DTAA, and, therefore, Article 3(2) of India - Thailand DTAA permits the adoption of the term ‘process’ as defined under the domestic law.*

(vi) *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in ignoring the fact that there is nothing in the India-Thailand DTAA that restricts the scope of the term ‘process’.”*

3. Despite service of notice, none appeared on behalf of the assessee.

However, we find that the issue stands covered in favour of the assessee.

Hence, we proceed to decide the present appeal after hearing the Ld.DR for the

Revenue.

4. Briefly in the facts of the case the assessee had claimed that the income earned by it from providing transponder services to customers in India is not taxable in its hands. According to the assessee, the income earned by it from providing transponder services is neither taxable as per provisions of the Act nor as per India-Thailand DTAA. The Assessing Officer held that the assessee to be in default and held that the transponder charges received by the assessee were taxable as royalty in the hands of the assessee under the provision of section 9(1)(vi) of the Act as well as corresponding provisions of DTAA between India and Thailand. The CIT(A) vide para 4.4 at page 6 onwards notes that the issue was arising in the earlier year and the Hon'ble High Court in assessee's own case had decided the issue in favour of the assessee. The citation being DIT vs M/s. Shin Satellite Public Co.Ltd. 382 ITR 114, order dated 08.02.2016. The CIT(A) allowed the claim of assessee. The Revenue is in appeal against the order of CIT(A) before us.

5. We find that the similar issue of transponder charges being received by the assessee, non-resident while providing digital broadcast services through the transponder to the customers, both residents in India as well as non-residents, was held to be not royalty in the hands of the assessee, both under the provisions as well as DTAA between India and Thailand. The assessee was earlier known as M/s. Shin Satellite Public Co.Ltd.

6. Similar issue arose before in the hands of the assessee in earlier years and the matter travelled till Hon'ble High Court. The Hon'ble High Court in

the decision reported DIT vs M/s. Shin Satellite Public Co.Ltd. (supra) vide judgment dated 08.02.2016 had raised the following questions before it:-

1. *“Whether the receipts of the assessee 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 would be eligible for the benefit under the relevant Double Tax Avoidance Agreements.”*

7. Thereafter, the matter was considered at length by the Hon'ble High Court and it was concluded as under:-

59. *“On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(l)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort- at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAA's.*

60. *Consequently, since we have held, that the Finance Act, 2012 will not affect Article 12 of the DTAA's, it would follow that the first determinative interpretation given to the word. "royalty" in Asia Satellites<sup>9</sup>, when the definitions were in fact pari materia (in the absence of any contoured explanations), will continue to hold the field for the purpose of assessment years preceding the Finance Act, 2012 and in all cases which involve a Double Tax Avoidance Agreement, unless the said. DTAA's are amended, jointly by both parties to incorporate income from data, transmission services as partaking of the nature of royalty, or amend the definition in a manner so that such income automatically becomes royalty. It is reiterated, that the Court has not returned, a finding on whether the amendment is in fact retrospective and applicable to cases preceding the Finance Act of 2012 where there exists no Double Tax Avoidance Agreement.”*

8. Applying the said proposition to the facts and circumstances of the case, we hold that the income received by the assessee non-resident on account of transponder charges from the customers in India amounting to Rs.4.18 crores (approx.) was not taxable as royalty in its hands. The same is also not taxable under the provisions of DTAA between India and Thailand. Consequently, the grounds of appeal raised by the Revenue are dismissed.

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 14<sup>th</sup> May, 2020.

**Sd/-**

**(PRASHANT MAHARISHI)**  
**लेखा सदस्य / ACCOUNTANT MEMBER**

**Sd/-**

**(SUSHMA CHOWLA)**  
**उपाध्यक्ष / VICE PRESIDENT**

दिल्ली / दिनांक Dated : 14<sup>th</sup> May, 2020

\* Amit Kumar \*

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order is forwarded to :

1. **अपीलार्थी** / The Appellant
2. **प्रत्यर्थी** / The Respondent
3. **आयकर आयुक्त(अपील)** / The CIT(A)
4. **मुख्य आयकर आयुक्त** / The Pr. CIT
5. **दिल्ली** / DR, ITAT, Delhi
6. **गार्ड फाईल** / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली  
**Assistant Registrar, ITAT, Delhi**