

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH  
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER  
&  
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.2463/Mum/2022 & 2464/Mum/2022  
(Assessment Year :2018-19 & 2019-20)**

M/s. Fedex Express International B.V. 111, FedEx Express International Centre Taurusavenue Hoofddorp Amsterdam Netherlands	Vs.	Assistant Commissioner of Income Tax (International Taxation)-2(3)(1) Mumbai
<b>PAN/GIR No.AADCF2700Q</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Sriram Seshadri / Shri Mehul Jain & Ms.Amulya
Revenue by	Shri Soumendu Kumar Dash
<b>Date of Hearing</b>	<b>27/06/2023</b>
<b>Date of Pronouncement</b>	<b>31/07/2023</b>

**आदेश / O R D E R**

**PER AMIT SHUKLA (J.M):**

The aforesaid appeals have been filed by the assessee against separate final assessment orders dated 29/07/2022 for the A.Yrs.2018-19 & 2019-20 passed u/s.143(3) r.w.s. 144 C(13) in pursuance of directions given by the DRP dated 29/06/2022.

2. Since this issues involved in both the years are common arising identical set of facts, therefore, same were heard together and are being disposed of by way of consolidated order.

3. The grounds raised by the assessee mostly relates to attribution of profits in respect of outbound and inbound shipments u/s.9(1)(i) of the Act and Article 7 of the Double Taxation Avoidance Agreement between India and Netherlands. The common grounds in both the years can be summarized as under:-

GoA	GoA No. [AY 18-19]	GoA No. [AY 19-20]
a. Assessment proceedings are <b>bad in law</b> and invalid	N/A	1.
b. <b>Attribution of profits</b> in respect of outbound and inbound shipments under Section 9(1)(i) of the Act and Article 7 of the Double Taxation Avoidance Agreement between India and Netherlands ('Treaty')	1. (1.1. - 1.3- )	2. (2.1. - 2.3)
c. <b>Arbitrarily assigning ad hoc ratios</b> to origin country, transshipment and destination country- to compute taxable revenue attributable to the alleged PE of the Appellant in India	2.	3.
d. Considering <b>a deemed profitability rate of 2 percent</b> despite losses incurred by the Appellant	3.	4.

e. <b>Not allowing a deduction of profits already taxed in the hands of the Indian AEs</b> , whose activities are alleged to be creating a PE while computing income taxable in the hands of the Appellant.	4. (4.1. -4-2.)	5. (5.1-5-2)
f. Not providing an <b>opportunity of being heard</b> to the Appellant	5.	6.
g. On the facts and circumstances of the case, the learned AO erred in <b>not granting the appropriate interest under Section 244A</b> of the Act amounting to Rs.11,51,739  On the facts and circumstances of the case, the learned AO erred in <b>not granting the appropriate interest under Section 244A</b> of the Act of Rs.1,37,45,313		7.

4. At the outset grounds mentioned at Sr. No. 'a' and Sr. No. 'f' have not been pressed, therefore, same are dismissed as not pressed and in so far as ground mentioned at 'g' is consequential.

5. The brief facts and background of the case are that Fedex Express International B.V. (the assessee) is a part of the multinational Federal Express Group ('the Group' / 'FedEx Group'), a global provider of express transportation, e-commerce and supply chain management services. The assessee is a company incorporated under the laws of the Netherlands. It acts as the regional principal for Middle East, Indian subcontinent and Africa region (MEISA Region'), which includes India. It is a tax resident of the Netherlands.

6. The assessee is responsible for providing strategic direction for global operating infrastructure in the FedEx Express international markets. In its capacity as a 'Regional Principal', the assessee is engaged in transportation of time-sensitive and time-definitive shipments to various destinations around the world and is responsible for the delivery of the freight to the airport/ultimate destination, as the case may be. Further, in connection with the transportation of cargo, the assessee also undertakes to pay duties and taxes at airports outside India, on behalf of the consignors/consignees. In relation to India, the assessee provides the said transportation services to two of its group entities in India, i.e., FedEx Express Transportation and Supply Chain Services India Private Limited (FETSCS) and TNT India Private Limited (TNT India) (together referred to as the 'Indian Associated Enterprises' / Indian AEs) by engaging the services of Federal Express Corporation (FEC), an airline entity incorporated in the United States of America. No part of the assessee's services to the said Indian AEs is carried out in India, and the assessee does not have any of its operations, employees or assets in India.

7. FETSCS is a private limited company in India having its registered office in Mumbai, Maharashtra, and is primarily engaged in the business of door-to-door delivery of goods/documents within and outside India, by air as well as surface distribution in India. It is also engaged in supply chain management, warehousing within the territory of India, custom

clearance and other ancillary services, and has its operations spread across five business segments in India, ie, inbound, outbound, domestic services, support services and pricing related support services segments

8. TNT India is the local operating entity of the acquired TNT Group, in India, and is engaged in the business of courier and express services. Post-acquisition of TNT Express by FedEx Group, TNT India became part of FedEx Group. It is engaged in the business of international express distribution of freight, parcels and documents. In the course of its business operations, TNT India contracts with Indian customers to deliver freight, parcels and documents to destinations outside India, utilizing the services of the overseas Group Network.

9. In this regard, the assessee entered into a Transportation Services Agreement (TSA) with FETSC and TNT India. Pursuant to the said TSA, FETSCS and TNT India engaged the assessee for provision of transportation services outside India (i.e, from and to India), in respect of their respective customers' packages, against payment of International Transportation Fee (TTF) and International Hub Service Fees (IHSF) respectively to the assessee. The assessee is responsible for the transportation and delivery of the said packages from an Indian airport to its ultimate destination outside of India, and vice-versa. The details of the amounts received by the assessee for the impugned AYs are tabulated below:

<b><u>AY 2018-19</u></b>	<b><u>Amount (INR)</u></b>
ITF from FETSCS	82,97,81,497
IHSF from TNT India	9,80,96,213
Assessee's Total Income from its Indian AES [A+B]	92,78,77,710

<b><u>A.Y.2019-20</u></b>	<b><u>Amount (INR)</u></b>
ITF from FETSCS	10,06,47,62,901
IHSF from TNT India	1,22,25,67,999
Assessee's Total Income from its Indian AES [A+B]	11,28,73,30,900

10. Similarly, the assessee is engaged FETSCS and TNT India for provision of transportation services within India (ie. from and to an airport in India), in respect of its customers' packages, against payment of a fee thereafter referred to as Logistics Support Fee/'LSFY.

11. Both FETSCS and TNT are responsible for the transportation and delivery of the said packages from an Indian airport to its ultimate destination in India, or from its origin in India to an Indian airport. The details of the amounts paid by the assessee for the Impugned AYs are tabulated below:

<b><u>A.Y.2018-19</u></b>	<b><u>Amount (INR)</u></b>
LSF from FETSCS	15,52,68,802
LSF to TNT India	70,837,078
Total LSF paid to the Indian AES [A+B]	226,105,880

<b><u>A.Y.2019-20</u></b>	<b><u>Amount (INR)</u></b>
LSF to FETSCS	1,83,65,06,785
LSF to TNT India	91,39,33,547
Total LSF paid to the Indian AES [A+B]	2,75,04,40,332

12. Since, assessee was tax resident of Netherland holding a valid TRC elected to be taxed in accordance with India-Netherland DTAA filed return of income at 'Nil' justifying through a detailed note in the return of income. It has been stated by the assessee that as per Article 7 of India Netherland DTAA, such income shall be taxable to tax in India only if assessee has a PE in India and the profits in question are effectively connected to the said PE and accordingly, in the absence of a PE in India, ITF is not chargeable to tax in India. However, the ld. AO during the course of the proceedings in the case of the assessee for the Impugned AYS 2018-19 & 2019-20, alleged that the Indian AEs, to FETSCS and TNT India, were acting as the agents of the assessee in India, thereby constituting PES of the assessee. In this regard, the assessee was directed to furnish its submissions

on why the said Indian entities should not be considered as its PEs in India requiring attributing of profits in India.

13. Pursuant to the above, for AY 2018-19, the ld. AO made a reference to the TP Officer under Section 92CA of the Act, for determining the arms length price of the international transactions undertaken by the assessee, which included the transactions between the assessee and its alleged PEs in India. In light of the above, the ld. TP Officer passed the TP order dated 22.07.2021, under section 92CA (3) of the Act, without making any adjustments in respect of the assessee's international transactions with the Indian AES.

14. However, the AO concluded the assessment, alleging that the assessee has a business connection under section 9(1)(1) of the Act and a DAPE in terms of Article 5 of the India-Netherlands DTAA . The AO contended that FETSCS and TNT were acting as the Agents of the assessee in India, thereby constituting its DAPE and undertook profit attribution to the alleged India business of the assessee. Accordingly, the AO determined the revenue attributable to the India business by applying an ad hoc ratio of 55% of the work done in the country of origin, 22.5% in the country of trans- shipment and 22.5% in the country of destination, on the gross revenues. The said revenue was therefore, computed as 55% of the amounts earned by the assessee towards outbound consignments and 22.5% in respect



of inbound consignments (excluding pass through components such as freight).

15. As regards the revenue attributable to India business from inbound shipments, the amount paid by the assessee to its Indian entity towards LSP is taken at 100%, which is considered as 22.5% of revenue attributable to India business

16. Thereafter, the ld. AO determined the profits at the rate of 2% of the said revenue attributable to India, based on a committee recommendation as per the CBDT's Draft Report dated 18.04.2019, on profit attribution to permanent establishments, even though it was demonstrated before the Ld. AO that the assessee had losses in its books of account.

17. The ld. AO determined the attributable profits at the said rate of 2%, despite recognizing that the assessee incurred a loss of Euro 30,97,000/- globally, for the period commencing from 01.06.2017 up to 31.05 2018. The computation of the AO, is extracted below:-

<b>Particulars</b>	<b>Amount (INR Crores)</b>
Attribution of revenue in respect of outbound shipments of the transactions- 55% of Rs 92,78,77,711/- being the amount received by Assessee in outbound shipments (A)	51,03,32,741

Amount paid by Assessee to FETSCS/TNT for payment for logistic services (B)	22,61,05,879
i) Payment of logistics services fee to FETSCS – Rs. 15.52,68,802/- ii) Payment of logistics services fee to TNT India - Rs. 7,08,83,077/-	
Total attributable to India for outbound and inbound transportation services (A+B)	<b>73,64,38,620</b>

18. The AO undertook the attribution exercise on the same basis as above, for the Impugned AY 2019-20 as well.

19. Before us, the only controversy which has been raised is restricted to the issue of profit attribution to the said DAPE and did not challenge the existence of DAPE despite contending that it had a strong prima facie case that it does not have a PE in India. Before us ld. Counsel submitted that issue that if the payment has been given to get arm's length price, then there is no requirement for attribution of any profit and in its written submission following the decisions have been relied upon.

Case	Forum	Citation
1.Morgan Stanley & Co.	Hon'ble SC	162 Taxman 165
2.E- Funds IT Solution Inc.	Hon'ble SC	86taxmann.com 240

3.Honda Motor Co. Ltd., Japan	Hon'ble SC	92 taxmann.com 353
4.Honda Motor Co. Ltd., - Japan [Review Petition]	Hon'ble SC	108 taxmanu.com 300
5.Travelport Inc.	Hon'ble SC	149 taxmann.com 470
6. Set Satellite (Singapore)	Hon'ble Bombay High Court	30 <sub>7</sub> ITR20 <sub>5</sub>
7.BBC Worldwide Ltd.	Hon'ble Delhi High Court	16 taxmann.com 162
8.Adobe Systems Incorporated	Hon'ble Delhi High Court	69 taxmann.com 228
9. Asia Today Ltd. 1	Hon'ble ITAT, Mumbai	124 taxmann.com 1
10. ESS Advertising (Mauritius) SNC et Compagnie	Hon'ble ITAT, Delhi	101 taxmann.com 312

20. On the other hand, ld. DR strongly relied upon the order of the ld. AO and ld. CIT (A) and submitted that once profit attribution is to be decided, then it has to be seen what are the functions performed as assets required and estimates while determining the transactions whose margin / profit are to be determined and ld. AO has correctly determined the revenue attributed to India business and the ratio for computing profits.

21. We have heard rival submissions and also perused the relevant finding given in the impugned orders as well as the orders referred to before us. In so far as the issue of dependent agency PE of the assessee in India, it has not been contested by the ld. Counsel and only issue before us is the issue of profit attribution from the alleged DAPE which is to be decided. As discussed above, assessee is engaged in transportation of time-sensitive and time-definitive shipments to various destinations around the world and is responsible for the delivery of the freight to the airport/ultimate destination. It also undertook to pay duties and taxes at airports outside India on behalf of consignors/consignees. In India, assessee provides transportation services to its group entities in India i.e. FedEx Express Transportation and Supply Chain Services India Private Limited (FETSCS) and TNT India Private Limited (TNT India) by engaging the services of Federal Express Corporation (FEC), an airline entity incorporated in the United States of America. Indian AEs have the registered office in India and are primarily engaged in business of door to door delivery of goods, documents within and outside India by air as well as surface distribution in India. These AEs are also engaged in supply chain management, warehousing within the territory of India, custom clearance and other ancillary services. TNT India is the mainly engaged in the business of courier and express services. The assessee has entered into Transportation Services Agreement with both Indian AEs and pursuant to the said agreement, assessee was providing transportation services outside India, i.e., from and to India in

respect of their customer packages, against payment of International Transportation Fee (ITF) and International Hub Service Fees (IHSF) respectively to the assessee. The assessee is responsible for transportation of the said packages from Indian airport to its ultimate destination outside of India, and vice-versa. The amounts received for the impugned assessment years are as under:-

<b><u>AY 2018-19</u></b>	<b><u>Amount (INR)</u></b>
ITF from FETSCS	82,97,81,497
IHSF from TNT India	9,80,96,213
Assessee's Total Income from its Indian AES [A+B]	92,78,77,710

<b><u>A.Y.2019-20</u></b>	<b><u>Amount (INR)</u></b>
ITF from FETSCS	10,06,47,62,901
IHSF from TNT India	1,22,25,67,999
Assessee's Total Income from its Indian AES [A+B]	11,28,73,30,900

22. Similarly, assessee has engaged its AE for transportation services within India in respect of its customer packages against payment of fee. Indian AEs are responsible for transportation delivery of the said packages from an Indian airport to its ultimate destination in India or from its origin in India to Indian

airport. Likewise, the details of amounts paid by the assessee in the impugned assessment years are as under:-

<b><u>A.Y.2018-19</u></b>	<b><u>Amount (INR)</u></b>
LSF from FETSCS	15,52,68,802
LSF to TNT India	70,837,078
Total LSF paid to the Indian AES [A+B]	226,105,880

<b><u>A.Y.2019-20</u></b>	<b><u>Amount (INR)</u></b>
LSF to FETSCS	1,83,65,06,785
LSF to TNT India	91,39,33,547
Total LSF paid to the Indian AES [A+B]	2,75,04,40,332

23. As per Article 7(2) of India-Netherlands treaty, not all the profits of foreign enterprises in India would be taxable in India and it is only those which have economic nexus with India. If compensation to the foreign enterprise in India is justified by FAR analysis and transfer pricing analysis and if it has been found to be at arm's length, then no further income should be attributed to its PE in India, because when for the same transaction, arm's length analysis has been undertaken and is equated with attribution of profits, then we do not find any reason as to why such adhoc attribution should be made as done by the ld. AO. Here, in this case Indian companies whose

activities constitutes a PE for the foreign enterprise, and it has been remunerated on an arm's length basis upon taking into account all the functions and assets and risks of the foreign enterprise in India and if the same are found at arm's length, then there is hardly any scope left from making any further attribution to the PE. The situation would however be different if TP analysis does not adequately reflect the functions performed and the risks assumed on behalf of the foreign enterprise in India, then there would arise a need to attribute profits to the PE for those functions/risks that have not been considered in the TP analysis. Then such determination exercise of attribution would be based on the facts of the case.

24. These propositions has been reiterated by the Hon'ble Supreme Court in the case of E-funds (supra) relying on its earlier decision of Morgan Stanley (supra) wherein the Hon'ble Supreme Court has held that no further profits could be attributed, even if there existed a PE in India, where transactions between foreign enterprise in India and Indian entity which is the PE, are at arm's length price. Herein, the profits attributable to the PE shall be determined in accordance with Article 7 of India-Netherland Tax treaty, which for sake of ready reference is reproduced hereunder:-

*"2. Subject to the provisions of paragraph (3), where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise*

*engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment."*

25. Thus, profits taxable in India are those profits which Indian AEs are expected to earn under same or similar uninfluenced conditions, which is nothing but arm's length profit which are expected to be earned and is a kind of reward of the economic activities which is carried out in India. Here, the entire economic activity in India is carried by the Indian AE whose activities have been held to be DAPE for the assessee and if such economic activities have been held to be at arm's length in the case of Indian AEs then it has to be reckoned to have been rightly rewarded, then nothing further survives to be taxed in India in the hands of the assessee.

26. It has been also brought on record that assessee has been subjected to TP adjustment and in the case of the assessee also the transactions have been found to be at arm's length and additionally one of the two Indian AEs have also been subjected to TP adjustment and its transaction with assessee also to be at arm's length and new adjustments have been made.

27. Before us, ld. Counsel had also brought on record and also showed from TP documentation for A.Y.2018-19 of the assessee and both the Indian AEs and also from the TP order of the assessee and TNT India for the same year, that the international transactions of the Indian AEs with the assessee, are at arm's length price wherein the mean margin determined based on five



comparable companies in the case of both Indian AEs was 2.85% of income while the assessee has remunerated at a higher margin of 4% on their gross income. Apart from that, the ld. TPO has not recorded any finding that suggests that all the FAR undertaken by each of the parties were not adequately captured which negates any requirement for further attribution of profits in the absence of any left-out functions and risk taking activities. Accordingly, we agree with the contention of the ld. Counsel that once the transactions have been found to be at arm's length, no further profit attribution can be made.

28. In any case, it has been brought on record that assessee had incurred losses in the fiscal year 2018, 2019 and 2020 and ld. AO without analyzing the transactions had made the losses of the assessee into profit just merely rely on the draft report of the CBDT and a recommendory course of action for the profit attribution to the PE. Before, us, ld. Counsel has also demonstrated as to how no income can be taxable in the hands of the assessee looking to the fact that already in relation to the operations carried out by the assessee for its Indian AE already income has been subjected to tax in India in the hands of the AE in the following manner:-

Particulars	AY 2018-19 (Amount in INR)	AY 2019-20 (Amount in INR)
Profits attributed by the Ld. AO (A)	1,47,28,772	17,91,69,446
Less: Profits already taxed in	5,00,50,249	61,30,37,171

the hands of FETSCS (B)		
In connection with the outbound segment	1,08,32,707	12,81,28,531
In connection with logistic service fees		
Less: Profits already taxed in the hands of TNT India (C)		
In connection with the billed segment	1,04,59,120	12,38,04,286
In connection with logistic service fees	49,42,122	6,37,62,806
Net Result [(A)-(B)- (C)]	-6,15,55,426	-74,95,63,348

29. The ld. DRP somewhere had stated that remuneration paid to Indian AE does not capture the functions/risks and return on the use of intangibles and therefore, it has upheld the profit attribution. Such a finding is not based on any proper analysis of the facts and documents and it is merely a hypothesis. Accordingly, such an observation of the ld. DRP cannot be sustained for the reason that already international transaction between assessee and the Indian AE have been subject matter of TP analysis and which had been concluded at arm's length price. Even if no reference to the TPO has been made in A.Y. 2019-20,

since the facts and circumstances and the margins on same transactions are the same and ld. AO was also not alleged that the transaction between the assessee and its AE are not at arm's length, then in such case also, we do not find any reason to deviate from the decision as applicable for A.Y.2018-19 also. Accordingly, this issue is decided in favour of the assessee. Finally, appeal of the assessee is allowed.

**21. In the result, both the appeals of the assessee are allowed.**

Order pronounced on 31<sup>st</sup> July, 2023.

**Sd/-  
(S RIFAUR RAHMAN)  
ACCOUNTANT MEMBER**

**Sd/-  
(AMIT SHUKLA)  
JUDICIAL MEMBER**

Mumbai; Dated 31/07/2023  
KARUNA, sr.ps

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**