BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)
NEW DELHI

7th Day of February, 2012

A.A.R. No.876 of 2010

PRESENT

Mr. Justice P.K.Balasubramanyan (Chairman)
Mr. V.K. Shridhar (Member)

Name & address of the Applicant	AREVA T&D India Limited, 'FSSC' Building, 19/1, GST Road, Pallavaram Chennai-600 043
Commissioner concerned	The Director of Income-tax (LTU), Chennai.
Present for the Applicant	Mr. L.V.Srinivsan, India Tax Director Mrs. P.Jayalakshmi, General Manager Taxation.
Present for the Department	Mr. S.D Kapila, Advocate & Spl. Counsel Mr. R.R.Maurya, Advocate Ms. Charu Kapoor, Advocate

RULING
(By Mr. V.K. Shridhar)

AREVA T&D SAS France (French Company)is a global player in design, engineering, manufacturing and supply of electric equipments that help in transmission and distribution of power, commissioning and servicing of transmission and distribution system on turnkey basis. It is submitted that it has 72 industrial sites and has presence in more than 100 countries catering to nearly

30000 customers across the world. AREVA T&D India Ltd, the Applicant, is its subsidiary in India, its activities overlaps with the French Company and has 9 manufacturing locations with 4,300 employees in India.

2. The French Company is proposing to enter into an Information Technology Sharing Services Agreement ("IT Agreement") with the Applicant in order to provide support services in the area of information technology. A central team of the French Company with the help of a service provider would be giving necessary assistance to all its subsidiaries, the group companies, in the world. The support services would be: worldwide network for data transfer between all group companies which will connect to all global applications of the French Company and intranet and internet traffic; messaging system for all e-mail communication between the subsidiaries and vendors, customers etc. It is stated that all these services will be provided across the world from France and the consideration for availing these services will be apportioned to all subsidiaries. In some cases the French Company may sub contract these services either to third party service provider and/or to any other subsidiary of the group. The allocation key for determining the consideration would be based on the service provider's invoices, indirect cost based on IP Bandwidth license user rights and number of users per application for each of its subsidiary. The invoice for the consideration of the services will be on quarterly basis which will include the share in the aggregate amount of cost incurred in providing the whole of the services that is to say that it will include direct and indirect cost incurred under the agreement including the

expenses paid to third parties, cost of personnel, travel and equipment related to the services.

3. The Applicant is of the view that the services rendered by the French Company are merely supportive and coordinated in nature and do not impart / enrich any technical knowledge to the Applicant. It is a service contract for availing certain common services from the French Company.

4. The Applicant has raised the following questions for a ruling by this Authority:-

i. *Whether the services as per proposed agreement would fall under the definition of Section 9(1)(vi) or Section 9(1)(vii) or both?*

ii. *If the answer to Question (i) is in the affirmative, then on what amount the income-tax is to be charged and what rate of tax, the Applicant is required to withhold in India?*

iii. *If the answer to Question (i) is in the negative, whether the income would be chargeable to tax in India and at what rate?*

iv. *Whether the payment to the Non-resident company under the proposed agreement would fall under the provisions of Article 13 of the DTAA between India and France in view of the Fact that AREVA T&D SAS France does not have a PE in India?*

v. *If the answer to question (iv) is in the affirmative what will be the applicable rate of withholding tax under section 195 of the Income-tax Act, 1961?*

vi. *If the answer to question (iv) is in the negative what will be withholding tax rate as per DTAA?*

vii. *Whether the portion of consideration payable to AREVA T&D SAS representing mere reimbursement of cost, can be considered as outside the purview of tax?*

5. The Applicant submits that payment for wide area network or messaging system or license user rights or application support do not fall under clause (iva) of Explanation 2 to section 9 of the Income-tax Act, 1961(Act), as the payment does not amount to right to use industrial, commercial or scientific equipment and hence cannot be brought under the definition of 'royalty'. While exercising the option available to it under section 90(2) of the Act to choose the DTAA provisions which are more beneficial, the Applicant submits that these services may potentially qualify as payments for the use of equipment or right to use the equipment under Article 13 of Indo-French DTAA. Referring to clause7 of the protocol to Indo-French DTAA, the Applicant submits that if the rate of tax or scope provided in a Treaty with a third state on 'royalties' and 'fees for technical services' is less restricted or lower than given in the Indo-French DTAA, then the scope so restricted in the said treaty with the third state shall apply to Indo-French DTAA as well. After India signed the treaty with France, it also signed a treaty with Sweden. Under Article 12 of Indo-Sweden DTAA, the definition of royalty does not include the payment made for the use of or right to use the equipment as given in the Indo-French DTAA. The scope available to tax the above payment is

restricted to rendering of any managerial, technical or consultancy services and not for payment of use of equipment. Thus applying the restricted definition, the payment for wide area network, messaging system, license to use rights and application support cannot be called 'royalty' under the Indo-French DTAA.

6. Without conceding, the Applicant submits that the said payment cannot be construed as 'royalty' under the Act as it is use of the facility and not the use of the equipment. The equipments are not placed in the possession and control of the Applicant. The Applicant cannot modify the equipment belonging to the service provider. The facilities are used by other group companies all over the world. There is thus no use or right to use the equipment and the services are towards use of facility of network belonging to the service provider.

7. The Applicant then submits that the services provided by the French Company could be categorized as fees for technical services in view of Explanation 2 to section 9(1)(vii) as these relate to technical support services. The definition as per Indo-French DTAA and the Act being similar, in view of the protocol of Indo-French DTAA, the Applicant is taking Treaty benefit of third OECD member Treaty i.e. Indo-UK DTAA where similar definitions are found and as also of Indo-Portugal DTAA. Under Article 13(4) (c) of the UK DTAA, fees paid for a mere rendering of technical or consultancy services is not sufficient. The rendering of such services should result in the "making available" the technical knowledge, experience etc. which can further be used in its business. By providing technical and functional support as and when requested, the French

Company does not make available the technical knowledge and skills to the Applicant. The Applicant cannot make use of these technical services in furthering its business except benefitting in its day to day operations by using certain standards. The proposed payment would not fall under fee for technical services and is not chargeable to tax in India. As the reimbursements are on actual cost basis, no tax is required to be withheld under section 195 of the Act.

8. It is argued by the learned counsel of the Revenue that neither the French Company nor the Applicant are in the business of providing services in the area of information technology. Notwithstanding, it has set up exclusive and confidential system for instant managing of various customized software and access to 3D and 2D data to the group companies and no third party is allowed access to the portal. In the absence of the nature of the data continuously exchanged amongst the group companies, the assumption is that the real time data and customized softwares installed on the system have direct connection with the business requirement of the Applicant. The business of the Applicant being that of executing projects for transmission and distribution of power on turnkey basis, it is obvious that the French Company and other group companies continuously upgrade designs, model and other engineering plans and formulae which are used by the Applicant for the purposes of its business. Therefore, the main objective of setting up an exclusive platform is not for providing information technology but for enabling the Applicant to use data in the form of design, plan, model and engineering formulae etc. in 2D and 3D form. The character of the payment is clearly ‘royalty’ as

defined under Article 13(3) of DTAA as well as Explanation 2 to section 9(1)(vi) of the Act.

9. The Revenue is of the view that Article 13(4) of Indo-French DTAA is materially the same as the DTAAs with other OECD countries. In view of the facts now made available during the course of hearing, it seems that the Revenue's case is not that the payments are for use of process or equipment. The IT support services are not provided to the Applicant to enable it to provide IT services, but to enable it to use the engineering data for the purposes of the business of setting up transmission and distribution power projects undertaken in India. The IT services are not an end in itself. The exclusive and continuous availability of engineering data for which the entire gamut of services including WAN and support services have been set up, clearly shows that the impugned payments are in the nature of 'royalty' and 'FTS' under the DTAA read with the protocol. Though it has been disputed by the Applicant, that the information available with the revenue is that there is no know how or technology transfer agreement between the Applicant and the group companies for continuous upgradation of technology in the form of model and design, but the fact is that it undoubtedly require verification by the assessing officer as it is a material factor to determine the use for which the portal has been set up by the French Company for use by other group companies.

10. The learned counsel for the Revenue submits that on the basis of the facts admitted by the Applicant, the French Company has entered into an agreement with France Telecom SAA for the provision of Data Network Services through an

undersea cable link with India. It has provided two gateway sites in Noida and Chennai. The perusal of the agreement clearly establishes that the Applicant has to prepare for the installation at the fixed gateway sites for proper installation of equipment by France Telecom. The Applicant has to act as bailee of the equipment which is under its control and use for its business. The use of equipment is with the usual condition of warranty and the network could be managed by the Applicant. The equipment installed is to be integrated into "Areva Net Global Network" which is managed and controlled by the French Company. The equipment installed at gateway sites in Noida and Chennai constitute PE in India as the equipment has been used by the French company in the course of its business in providing technical data to the group companies. A detailed and a proper inquiry is called for in case the Assessing Officer is directed to quantify the extent of attribution of income if it is held that the French Company has a PE in India.

11. Regarding the contention that the payment is only by way of reimbursement of expenditure incurred by the French Company on behalf of the Applicant and hence not taxable as income in its hands, the learned counsel for the Revenue submits that despite repeated requests, the Applicant has not furnished Annexure-2 of the service agreement between the French holding company and the Applicant which, as it turns out, is the price list of the services as defined in Appendix-2 of the Agreement. Appendix -2 has also not been furnished whereas Appendix-1 does not clearly refers to reimbursement of cost of services. If the

payment is by way of pure reimbursement of claim of actual expenditure without any mark-up of profit, there ought not be any requirement for a price list relating to the services. It cannot therefore be expected that the impugned payments are pure reimbursement of expenses incurred by the French Company on behalf of the Applicant for the purposes of the Applicants' business.

12. The basis of the present Application is the draft 'Information Technology Sharing Services Agreement' ("IT Agreement"). The IT Agreement is between French Company and the Applicant. Under the IT Agreement, the Service Provider shall mean any AREVA Group Subsidiary or any third party. There is no clear demarcation as to what services will be provided by the French Company and for which services the French Company will hire a Service Provider. The Applicant has no say and does not need to pre-approve any Service Provider under the IT Agreement. Hence the crux of the IT Agreement is that the French Company may sub-contract/ hire the services of any third party/Subsidiary to provide the services to the Applicant.

13. We have on record one such Agreement for the provision of data network services between the French Company and French Telecom (Service Agreement). However, the Service Agreement is of no consequence since the IT Agreement clearly mentions that the French Company may hire any third party and no reference is drawn to the French Telecom or to the Service Agreement. The Applicant has not submitted that we must read the IT Agreement along with the Service Agreement. There is nothing on record to show whether any services have

been rendered under the Agreement in India. Hence, we do not see the need to discuss the Service Agreement.

14. We must therefore analyse the services under the IT Agreement on a standalone basis and determine their taxability. Under the IT Agreement, the French Company will be rendering the following services –

i. WAN – Areva T & D Network

ii. Lotus Notes – Areva T & D Messaging System

iii. License User Rights

iv. Application Support

15. We cannot agree with the arguments of the Applicant that payments under the IT Agreement are in the nature of re-imbursements to the French Company. The IT Agreement in the Preamble states that the French Company has the capacity and the resources to provide and co-ordinate IT Services to the Applicant. There is nothing on record from which we could infer that the present transaction is in the nature of reimbursement.

16. In our view if the French Company has a Permanent Establishment in India, the payment by the Applicant to the French company under the IT Agreement will be treated as Business Income and will be liable to be taxed accordingly.

17. Under the IT Agreement, there is a very vague description of the services. For providing services under both WAN and Lotus Notes, some hardware is to be utilized. Under Clause 3.1 of the IT Agreement, WAN Services costs include costs

for local loop lines rentals. The payment that will be made by the Applicant includes cost for depreciation and maintenance of hardware. In the clarifications provided by the Applicant, the Applicant has submitted that WAN services are provided through an undersea cable infrastructure. Under Clause 3.2, Lotus Notes Service costs include costs such as SMTP gateway. As submitted in the clarifications, each gateway consists of a link and router and the same will belong and will be controlled by a Service Provider.

18. Under the IT Agreement, the French Company may be hiring/taking on rental the above mentioned equipment for providing services. U/s 245N(a)(ii) of the IT Act, 1961, determination by the Authority in relation to the tax liability of a non resident arising out of a transaction which has been undertaken or proposed to be undertaken by a resident applicant with such non-applicant, "…shall include determination of any question of law or of fact specified in the Application." However, the factual details of the proposed transaction have not been shared with us. There is a failure on part of the Applicant in sharing the details of what equipment is going to be used and whether or not and to what extent is the same going to be hired. Hence, we are free to presume that the French Company may either own the equipment and even where it hires the equipment, the same will be under exclusive control of the French Company.

19. Let us now examine whether this equipment that would be owned/hired by the French Company in India will amount to a Permanent Establishment ("PE")in India.

Under the India- France DTAA, ARTICLE 5 deals with Permanent establishment *and states the following* –

" *1.* For the purposes of this Convention, the term "permanent establishment" means a fixed *place of business* through which the business of an enterprise is wholly or partly carried on."

Article 5 (2) thereafter gives an inclusive list of what may be a PE.

20. A Place of Business means all tangible assets (eg premises, facilities, machinery or equipment or installations) used for carrying on the business, whether or not they are exclusively used for business purpose. Para 17 of the Model Commentary states that a PE may exist if the business of the enterprise is carried on mainly through automatic equipment and the activities of the personnel are restricted to setting up, operating, controlling and maintaining such equipment. Thus even existence of a computer server amounts to existence of a PE within a jurisdiction.

21. We may further apply the Power of Disposition Test in the present case.

As per the UN Commentary (2001) para 3, the place of business which includes equipment should be at the Disposal of the foreign enterprise for the purpose of the business activities. Since there will be no contractual relation between the Applicant and other service provider, all equipment under the IT Agreement, whether owned or hired by the French Company, will be at the disposal of the French Company. Further, Rajesh Kadakia, NileshModi, The law and Practice of Tax Treaties: An Indian Perspective, (2008) on Pg 209 states

"…if the personnel operate and maintain the leased equipment under the responsibility and direction of the foreign lessor, a PE may exist if such operation or maintenance satisfy the tests of PE."

In our opinion, since the tests of PE are satisfied, whether it is equipment leased or it is owned by the French Company, will be of no consequence.

22. As per the discussion above, a PE of the French Company will be formed in India, if the French Company enters into the proposed IT Agreement. Then, under Article 7 of the Indo –French DTAA, the profits of the French Company, so much of it as is attributable to that permanent establishment in India, shall be taxable in India. Now, under the IT Agreement, the Applicant has submitted that the services provided by the French Company could be categorized as FTS in view of Explanation 2 to section 9 of the Act. But taking benefit of the MFN clause in the protocol attached to the DTAA, mere rendering of technical or consultancy services is not sufficient to constitute FTS. Thus, the Applicant admits that the Services fall within the ambit of FTS and only states that since the services cannot be said to have been made available, the income is not taxable as FTS.

Let us now examine whether the services are "made available". We have noted that under the IT Agreement, the French Company is to provide support services through a central team in the area of Information Technology to the Applicant and to its other subsidiaries in the world. The provision of support services by the French Company would itself make available, the technical knowledge / experience to the Applicant.

In Perfetti Van Melle Holding B.V[1] this Authority held the view that "the expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or know-how in future on his own". Here, information technology relating to design, engineering, manufacturing and supply of electric equipment that help in transmission and distribution of power, commissioning and servicing of transmission and distribution system is provided to the Indian entity which is applied in running the business of the Applicant and the employees of the Applicant would get equipped to carry on these systems on their own without reference to the French Company, when the IT Agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the agreement on its expiry.

We are of the view that the services provided under the IT agreement are in the nature of Fees for Technical Services and taxable under the DTAA as well as under the Act. As the Applicant has a PE in India, the income by way of FTS will be taxed under Section 44DA of the Act.

Accordingly the questions are answered as under –

Que.No.(i) The services as per proposed agreement fall under the definition section 9(1)(vii).

Que.No.(ii) The amount on which the income-tax is to be charged would be on the income computed under section 44DA of the Act and at the

[1] AAR/869/2010

rate provided under the Finance Act for the relevant year and tax withheld accordingly.

Que.No.(iii) The income would be chargeable to tax in India in view of our answer to question No.(ii).

Que.No.(iv) As we have held that Areva T&D SAS France has a PE in India, the payment to it would not fall under the provision of Article 13 of the DTAC.

Que. No.(v) Refer to answer to Que.No.(ii).

Que. No.(vi) Refer to answer to Que.No.(ii).

Que. No.(vii) The consideration payable to Areva T&D SAS France does not represent reimbursement of cost and is taxable in India.

Accordingly, ruling is given and pronounced on 7th day of February, 2012.

(V.K.Shridhar)
Member

(P.K.Balasubramanyan)
Chairman