IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'L' MUMBAI

BEFORE SHRI J. SUDHAKAR REDDY (AM)
AND SMT. ASHA VIJAYARAGHAVAN (JM)

ITA No. 671/Mum/2007
Assessment Year- 2003-04

DDIT(IT)-2(1), 120, Scindia House, Ballard Estate, Mumbai-400 038	Vs.	M/s. Tekmark Global Solutions LLC, RSM & Co., Ambit RSM House, 449, Senapati Bapat Marg, Lower Parel, Mumbai-400 013
(Appellant)		(Respondent)

Appellant by: Shri Narender Singh
Respondent by: Shri Kanchun Kaushal,
Shri Dhanesh Bafna &
Shri Aliarger Rampurwala

O R D E R

PER SMT. ASHA VIJAYARAGHAVAN (JM)

This appeal preferred by the Revenue is directed against the order dt. 19.9.2006 passed by the Ld. CIT(A)-XXXI, Mumbai for the assessment year 2003-04 for treating the fees received by the assessee for deputing two persons to India as a business profit in as much as the assessee should be considered as a person having permanent establishment in India.

2. The facts of the case are as follows:

> *"Tekmark Global Solutions LLC ("Tekmark") is a tax resident of USA. During the FY 2002-03, Tekmark had an arrangement with Lucent Technologies Hindustan Private Limited ("Lucent India") in terms of which Tekmark personnel were deputed to Lucent India purely on a hire out basis. The personnel work under the supervision and control of Lucent India. However, during the FY 2002-03, no remittances have been made by Lucent India to*

Tekmark in respect of personnel deputed to Lucent India. Tekmark, has opted to follow the cash system of accounting. Accordingly, there is no income liable for tax in India during the FY 2002-03."

During the previous year, the assessee has raised invoices on M/s. Lucent Technologies Hindustan Pvt. Ltd. (Lucent):

Invoice No.	*Amount (USD)*
03012003	*828692.51*
03028927	*1005937.68*

Total	*1834630.19*
	=========

The assessee has submitted vide its letter dated 12.09.2005, that the following employees have visited India.

Name of the Employee	*Duration of Stay*
Mr. Zapata Jaun Eligio	*November 25, 2002 to June 14, 2003*
Mr Zapata Rivero Raul	*January 13, 2003 to April 28, 2003*

It has further submitted that no services have been rendered to Lucent through these employees in India. It has only deputed its personnel to Lucent India and therefore has not rendered any services in India. It further stated that the responsibility of Tekmark is only to depute personnel as per the specifications of Lucent.

The assessee made another submission on 14.12.2005, wherein, the unsigned copy of an agreement with Lucent was attached, the contents of which are reproduced as under:

Dear Mr. Bhagwan Das,

Sub: Letter of understanding for deputation of personnel in USA.

This is further to our discussions on the captioned matter. As discussed and agreed, this letter documents our understanding in connection with the captioned arrangement.

As per our understanding, Lucent Technologies (Hindustan) Pvt Ltd. (LH) requires additional personnel having specific qualifications and expertise for LH's use on a global basis.

We would be glad to provide the requisite personnel as and when requisitioned by you. The broad terms of this arrangement (as discussed) are detailed hereunder:

- *LH will intimate Tekmark Global Solutions, LLC (TGS), at least 10 days in advance for necessary mobilization.*
- *On receiving final approval from LH, TGS will make arrangements to depute such personnel forthwith.*
- *TGS will initially incur the deputation cost. Subsequently, it will charge LH for such deputation.*
- *The deputed personnel will work under the direction, supervision and control of LH. TGS will not be held responsible for the work done or action taken by such deputed personnel. LH will arrange for the lodging, boarding and other related expenses of such deputed personnel. However, the deputed personnel will remain on the payroll of TGS.*
- *In case any deputed personnel is found not to be suitable/efficient or is not of sound moral character then LH has a right to send the personnel back to TGS.*

The assessee made another submission dated 30.12.2005, wherein it mentioned that the application was filed by it with the I.R.S. of U.S., requesting them to issue a Tax Residency Certificate.

3. The AO has held that in case of partnership the term resident of USA would apply only to the extent that the income derived from such partnership is subject to tax in USA as the income of resident either in its hands or in the hands of its partners and hence the provision of the treaty cannot be filed by the assessee. As the assessee could not file copy of the tax residency certificate the AO held that the income directly accrued to the assessee in India through its employees who were provided to the services of Lucent as per the terms and conditions and hence the entire amount of Rs.8,98,96,880 is taxable u/s.5(2)(1) of DTAA and had accordingly raised the demand. On appeal before the Ld.CIT(A) the assessee filed the tax residency certificate and the same had been accepted by the AO. The assessee raised the following grounds of appeal before the Ld. CIT(A).

I. The Appellant respectfully submits that based on the facts, circumstances of the case and internationally accepted tax principles the Deputy Director of Income-tax (DDIT) has grossly erred in holding that the Appellant exposes a PE in India under Article 5(2)(ii) of India-US Double Tax Avoidance Agreement (DTAA).

II. Without prejudice that the PE is not exposed, the DDIT has erred in concluding that the Appellant is a Partnership and is not a tax resident of USA for the purposes of DTAA and hence, it cannot avail the benefits of the provisions of DTAA. The DDIT failed to appreciate the tax filing requirements in the US and ought to have held that:

* The Appellant is a Limited Liability Company (LLC) and has only elected to be taxed as a 'Partnership' in terms of US domestic tax law and hence, is eligible to avail the benefits of the DTAA.

III. Without prejudice that a PE is not exposed, the DDIT has erred in concluding that the income is taxable during the relevant assessment year. The DDIT failed to appreciate and ought to have held that:

*During the relevant assessment year the Appellant had followed the cash system of accounting as permitted under Section 145 of the Act and since, the Appellant had not received any payments during the financial year 2002-03, it does not have any taxable income during that year.

IV. Without prejudice that a PE is not exposed, the DDIT has erred in ignoring the fact that even if the said income is considered to be taxable in India under the Act, the same could only be considered as Fees for technical Services (FTS) in terms of Section 9(1)(vii) of the Act.

V. The DDIT has erred in not granting credit of tax deducted at source and he ought to have held that since the payments made to the Appellant were subject to deduction of tax at source, the tax liability, if any, gets extinguished.

VI. The DDIT has erred in levying interest under section 234B of the Act, ignoring the fact that since the payments made to the Appellant were subject to deduction of tax at source under Section 195 of the Act, the liability to pay advance tax, itself does not arise and therefore, no interest u/s.234B can be levied."

4. The CIT(A) perused the agreement and has held as under:

"Perusal of the agreement clearly reveal that the appellant had agreed to provide personnel to Lucent India as and when required. Agreement also provides that the deputed personnel will work under the supervision of Lucent India. The appellant will not be held responsible for the work done or action taken by such deputed personnel. Lucent India will arrange for the lodging, boarding and other related expenses of such deputed personnel. The deputed personnel will remain on the payroll of TGS i.e. appellant. If the deputed personnel is found not be suitable/efficient or is not of sound moral character then Lucent India will have right to send the personnel back to the appellant. Perusal of the agreement reveals that there is no mention of any services being provided by appellant to Lucent India. The appellant is providing only personnel and not furnishing any services through the personnel. I am accordingly of the view that the case of appellant is not covered by clause (1) of Article 5(2) as the appellant is not furnishing any services through the employees or other personnel. The appellant is only providing personnel on hire basis. Further, the appellant is also not supervising the activities of his personnel nor directing them to act in a certain manner. These personnel are also not under the control of the appellant for their work. I am therefore of the view that the case of the appellant is not covered under clause (1) of Article 5(2) of the DTAA.

Hon'ble AAR has given a ruling in the case of M/s.Tekniskil (Sendirian) Berhard vs. CIT (1996) 222 ITR 551 (AAR). In this case, TSB, a Malaysian company entered into a contract with HHI, a Korean company to provide workers. The work of these workers was to be supervised by HHI and workers had to work under the control of HHI. HHI could disqualify and demobilize any of the workers in the event of unsatisfactory services. The Hon'ble AAR had held that under these circumstances, the TSB was not providing any services but only providing workers on hire and income derived from such activity was only business income. TSB did not have a PE in India, therefore its business income was not taxable in India."

5. The CIT(A) has also distinguished another order of AAR reported in 242 ITR 208 observing as under:

"I have perused the order of the Hon'ble AAR. The facts in this case were totally different from those obtaining in the case of the appellant. In this case, A an Indian company, and B of USA formed

a joint venture company in India called AB for the production and sale of motor cars and automotive products. QAB entered into a technical information and assistance agreement with a German company, to enable it to produce certain motor vehicles under a technology license with the latter. AB also entered into a project management service contract with a foreign company XYN. The appellant XYZ was a company incorporated in the USA and it was wholly owned subsidiary of B company of USA. The business of XYZ as principally to provide management and consultancy services to B's subsidiaries or affiliated companies worldwide. AB entered into a management provision agreement with XYZ under which XYZ offered and AB received managerial services for the establishment, development and operation of its business in the manufacture and sale of cars under the joint venture agreement. Under the management provision agreement, the appellant was to make available executive personnel for development of general management, finance and purchasing, service, marketing and assembly/manufacturing activities. Under the management provision agreement, AB was required to pay to XYZ an annual fee equivalent to the costs incurred by the applicant on the employees. The issue was whether the fees received were liable to tax in India. The Hon'ble AAR has held that the services provided by XYZ were managerial and not technical or consultancy.

Perusal of the order and facts in this case clearly reveal that the prominent purpose of the agreement was the provision of managerial services and under that agreement executive personnel were deputed. On the other hand in the case of appellant there is no other agreement to provide services in connection with which personnel have been deputed. On the contrary the agreement is simply to provide personnel to work under the direction, supervision, control of Lucent India. In view of this, I hold that the ratio of ruling of Hon'ble AAR in the case of P.No.28 of 1999 (cited supra) is therefore not applicable in the case of the appellant. It is held that the appellant does not have a PE within the meaning of Article 5(2)(1) of the DTAA. The AO has therefore wrongly held that the appellant has a PE in India."

6. Considering the above, the CIT(A) allowed the appeal of the assessee by observing as under:

"The AO has himself held that within the meaning of DTAA, the payment received by appellant constitute business income and would be taxable in India only, if the appellant has a PE. As held

above, the appellant does not have a PE and accordingly its business income is not taxable in India as per Article 7 of the DTAA."

7. Aggrieved the Department is on appeal before us. We heard both the parties.

8. From the facts on record it is clear that what the American company has provided is selecting and offering personnel to work under the control and supervision of the assessee in India. It is not a part of any technical services to be rendered by the assessee to the Indian Company. The deputed persons are for all practical purposes employees of the Indian Company. They carry out work allotted to them by The Indian Company. Assessee has no control over the activities or the work to be performed by the deputed persons. Indian Company has a right to remove the deputed persons from the services. What the assessee recovered was the actual salary payable to the deputed persons. These would clearly show that the deputation cannot be treated as part of any technical services to be rendered by the assessee to the Indian Company. When the services rendered are independent of and not under the control of the assessee, the deputed persons cannot be considered as constituting a permanent establishment of the assessee in India. Hence there is no permanent establishment of the assessee in India. The actual salary of the deputed personnel reimbursed by the Indian company is only reimbursement of salary payable by the Indian Company advanced by the assessee to the employees.

9. Even assuming that there is a permanent establishment in India, there is no profit accruing from the activities in India as the Assessee is paid only the actual salary paid by them in advance to the deputed personnel. In the following decisions it has been held that there is no income in reimbursement of expenses.

CIT vs Industrial Engineering Projects(P) Ltd 202 ITR 1014 Del
CIT vs Siemens 310 ITR 320 Bom

10. In the circumstances, we hold that no income has arisen to the assessee in India in the course of deputing personnel to an Indian Company who work under the control and supervision of the Indian company and carry out the work allotted to them by the Indian Company and the assessee company is reimbursed the salary of the deputed employees paid by the assessee.

11. In the result the appeal preferred by the revenue is dismissed.

Order pronounced on this 23rd day of February, 2010

Sd/-
(J. SUDHAKAR REDDY)
Accountant Member

Sd/-
(ASHA VIJAYARAGHAVAN)
Judicial Member

Mumbai, Dated 23rd February, 2010
Rj

Copy to :
1. *The Appellant*
2. *The Respondent*
3. *The CIT-concerned*
4. *The CIT(A)-concerned*
5. *The DR 'L ' Bench*

True Copy

By Order

Asstt. Registrar, I.T.A.T, Mumbai

		Date	Initials	
1	Draft dictated on:	10.2.2010		Sr. PS/PS
2.	Draft placed before author:	10.2.2010	_____	Sr. PS/PS
3.	Draft proposed & placed before the second member:	_____	_____	JM/AM
4.	Draft discussed/approved by Second Member:	_____	_____	JM/AM
5.	Approved Draft comes to the Sr. PS/PS:	_____	_____	Sr. PS/PS
6.	Kept for pronouncement on:	_____	_____	Sr. PS/PS
7.	File sent to the Bench Clerk:	_____	_____	Sr. PS/PS
8.	Date on which file goes to the Head Clerk:	_____	_____	
9.	Date of dispatch of Order:	_____	_____	